Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-5026

BILLY RAY WILLIAMSON, Petitioner

v.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO._____

BILLY RAY WILLIAMSON, PETITIONER

V.

STATE OF ALABAMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The petitioner Billy Ray Williamson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceeding on January 5, 1979, rehearing denied on February 9, 1979.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals in Williamson v. State __So.2d____ (Ala. Crim. App. April 4, 1978) appears attached hereto as Appendix A. Appendix B contains the memorandum of the Alabama Supreme Court entered on January 5, 1979 affirming the judgment of the Court of Criminal Appeals as well as the order of the Court denying rehearing in the case.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on January 5, 1979. A timely petition for rehearing was denied on February 9, 1979. An application for extension of time to file petition for writ of certiorari was granted by this Court extending the time in which to file this petition to and including July 9, 1979. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The following questions arising from petitioner's conviction and sentence of death are presented to this Court for review.

WHETHER THE INABILITY OF THE JURY UNDER THE ALABAMA DEATH PENALTY ACT TO CONSIDER LESSER OFFENSES RENDERS THE ACT UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT?

The Alabama Death Penalty Act, Section 13-11-1 et seq., Code of Alabama 1975, unlike any death penalty statute in the nation, forbids the trial jury from considering lesser included offenses in capital cases. In Keeble vs. United States, 412 U.S. 205 (1973), this Court held that the federal Major Crimes Act could not be construed to preclude juries from receiving lesser offense instructions and that any statutory system which did preclude juries from receiving such instructions "would raise difficult constitutional questions". 412 U.S. at 213. In Gregg vs. Georgia, 428 U.S. 153, 199-200, n.50 (1976), this Court stated that a capital punishment scheme which would preclude, inter alia, lesser included offense instructions "would be totally alien to our notions of criminal justice" and "would be unconstitutional". This case places the question of constitutionality of such a capital punishment scheme as was condemned in Gregg squarely before the Court.

WHETHER THE REQUIREMENT UNDER THE ALABAMA DEATH PENALTY ACT THAT THE JURY EITHER CONVICT AND SENTENCE TO DEATH OR ACQUIT ENTIRELY WITHOUT CONSIDERATION OF AGGRAVATING OR MITIGATING CIRCUMSTANCES OR LESSER OFFENSES CAN BE UPHELD UNDER THIS COURT'S DECISIONS INVALIDATING MANDATORY DEATH PENALTY STATUTES.

Under the Alabama Death Penalty Act, a trial jury is not permitted to consider aggravating or mitigating circumstances or lesser offenses in reaching its verdict. It must either convict and sentence the capital defendant to death or must acquit him entirely. Only after the jury makes this unchecked and unstandarized determination does the trial judge consider whether to uphold the jury's sentence of death in light of aggravating and mitigating circumstances. This case presents to the Court the question of whether this unguided jury determination, prior to any individualized consideration by the trial judge, can pass constitutional muster in light of this Court's decisions in

Woodson vs. North Carolina, 428 U.S. 280 (1976) and Stanislaus Roberts vs. Louisiana, 428 U.S. 325 (1976) or whether it allows the trial jury to exercise the "de facto sentencing discretion" condemned in those cases.

WHETHER FAILURE OF ALABAMA'S CAPITAL SENTENCING PROCEDURE TO REQUIRE PROOF BEYOND A REASONABLE DOUBT OF THE AGGRAVATING CIRCUMSTANCES NECESSARY TO IMPOSE THE DEATH PENALTY IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT AND IS LACKING IN THE HIGHER DEGREE OF "RELIABILITY" REQUIRED BY THIS COURT IN CAPITAL SENTENCING PROCEDURES?

Aggravating circumstances necessary to justify the imposition of the death penalty are not required to be proven beyond a reasonable doubt under the Alabama Death Penalty Act, see Section 13-11-4, Code of Alabama, 1975. Neither the Supreme Court of Alabama nor the Alabama Court of Criminal Appeals has ever construed the statute to implicitly require such proof. This case presents to the Court the question of whether a death sentence imposed under a capital punishment sentencing procedure which lacks this requirement of proof is constitutionally valid under the Fourteenth Amendment and whether such a procedure contains the requisite "greater need for reliability" required for capital sentencing procedures under Woodson vs. North Carolina, 428 U.S. 280 (1976) and Lockett v. Ohio, 98 S.Ct. 2954 (1978).

WHETHER THE "STACKING" OF IDENTICAL AGGRAVATING CIRCUMSTANCES AND USE AS AN AGGRAVATING CIRCUMSTANCE MERE PROOF THAT PETITIONER HAD BEEN CONVICTED OF THE CRIME CHARGED RENDERS THE SENTENCING PROCEDURE EMPLOYED IN THIS CASE SUFFICIENTLY UNRELIABLE TO INVALIDATE PETITIONER'S DEATH SENTENCE.

The trial judge, in upholding petitioner's sentence of death in this case, cited three aggravating circumstances to justify his decision. Two of the aggravating circumstances listed were the same thing - that petitioner had committed the crime charged for pecuniary gain.[1] Further, one of the aggravating circumstances found by the trial judge was, in essence, that petitioner

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1 The trial judge found both that "the defendant committed the offense charged for pecuniary gain" Section 13-11-6(6) and that the "willfull killing of the victim was committed by the defendant while he was engaged in kidnapping the victim for ransom "Section 13-11-6(4) Code of Alabama 1975 .

had committed the crime for which he was charged.[2] Both of these aspects of the sentencing procedure employed in petitioner's case have been repudiated by the Alabama appellate courts and have been made the basis for reversal of death sentences in other cases. [3] This Court is presented with the question of whether the "greater need for reliability" required by Woodson v. North Carolina, 428 U.S. 280 (1976) and Lockett vs. Ohio, 98 S. Ct. 2954 (1978) was present in the sentencing procedure employed in petitioner's case.

WHETHER ADMISSION INTO EVIDENCE OF A STATEMENT MADE BY PETITIONER TO POLICE DURING INTERROGATION FOLLOWING A REQUEST BY PETITIONER FOR COUNSEL VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS?

Petitioner, while being transported by a deputy sheriff from Fort Payne, Alabama to Decatur, Alabama stated to the deputy sheriff that he desired counsel. After arrival in Decatur, this request was made known by the deputy sheriff to a Decatur City Police detective immediately prior to the beginning of questioning of petitioner by other city police detectives. This case squarely places before the Court the question which the Court did not decide in Brewer vs. Williams, 430 U.S. 387 (1977), i.e. whether all interrogation must cease when a request for counsel is made known. See Miranda vs. Arizona, 384 U.S. 436, 474 (1966). See also Michigan vs. Mosley, 423 U.S. 96, 104 (1975), n.10.

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2 The capital offense for which petitioner was indicted and convicted was "kidnapping for ransom or attempts thereof when the victim is intintionally killed by the defendant". Section 13-11-2(a)(1) , Code of Alabama, 1975

3 Recardo Cook v. State 369 So.2d 1251 (Ala. 1979); Roger Scott Thomas v. State, ___So.2d___, (Ala. Crim. App. March 27, 1979); Woodrow Wilson Keller v. State ___ So.2d _____, (Ala. Crim. App, February 20, 1979).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the Alabama Death Penalty Act, Section 13-11-1, et seq., Code of Alabama 1975. This statute is set forth as Appendix C to this petition.

STATEMENT OF THE CASE

Petitioner Billy Ray Williamson was indicted by the Morgan County Alabama Grand Jury on May 31, 1977 under the Alabama Death Penalty Act for the offense of kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant, § 13-11-2(a)(1), Code of Alabama, 1975. Petitioner pleaded not guilty to the charge. Petitioner has a third grade education, is blind in one eye, and does not see well out of the other and can barely read or write. (R.802-03). Petitioner's wife had suffered from kidney problems over a long period of time and on the date of the offense was in Birmingham undergoing a kidney transplant. (R.586). Williamson was deeply in debt due to his wife's hospital expenses. (R.1000).

The State's evidence at the trial tended to show that petitioner decided to kidnap the deceased, Jesse P. Davenport,and hold him for ransom. (R.1120). Petitioner had been employed by Davenport and Davenport's son in a variety of odd jobs over a number of years. (R.563). According to the States' evidence, petitioner enlisted his brother-in-law, Bradley Eugene Jackson, in the plan and he and Jackson together abducted Davenport. During the course of the abduction, Davenport was killed. (R.1120)

The day following the abduction, Tuesday, April 26, 1977, petitioner was questioned all night long by the police in regard to the deceased's disappearance. (R.834,909). The next day, law enforcement officers searched Jackson's car. (R.606). Blood and hair samples were found in the trunk of the car which were later determined to match the deceased's. (R.606.09, 648-53, 701-46). Warrants were then issued for petitioner's arrest. (R.766

Following his release by the police after questioning on the night of April 26-27, 1977, petitioner began traveling through East Alabama in a meandering sort of fashion. (R.837). Petitioner arrived in LaGrange, Georgia, that night and got a few hours sleep before departing before sunrise. (R.837) From LaGrange, Georgia, petitioner traveled within a few miles of his parents' home near Fort Payne, Alabama, where he abandoned his car and went into the woods without food nor shelter. (r. 838-41). Appellant remained in the woods from Thursday night until approximately 5:00 P.M. on Saturday. (R.840). Petitioner slept for approximately an hour on Thursday night (R.841) but was unable to sleep after that because rain began on Friday and continued through late Saturday. On Saturday afternoon petitioner went to his parents' house. (R.841).

Arriving at his parents' house he was placed under arrest by his brother, Jim Williamson, who is a DeKalb County, Alabama Deputy Sheriff. (R.841). Deputy Jim Williamson, with petitioner in custody, drove to the home of the Sheriff of DeKalb County. (R.811). During that drive, Deputy Williamson informed petitioner of his constitutional rights. (R.811). Petitioner stated to Deputy Williamson that he wanted to have an attorney. (R.817). The Sheriff of De Kalb County and Deputy Williamson drove petitioner to Decatur where petitioner was transferred from the custody of the Sheriff and Deputy Williamson to the custody of Decatur City Police Detectives. (R.813-14). Upon arriving at police headquarters, Deputy Williamson and petitioner conferred for a short period of time alone together in a room. (r.814) After a short time, Deputy Williamson emerged from the room and two Decatur police detectives entered the room. (R.765) Deputy Williamson, upon emerging from the room, informed a third detective standing outside the room that he "had advised (his) brother of his rights and that he had stated he wanted a lawyer." (R.817) The third detective

merely said "something to the effect that they would read his rights to him again". (R.817) It was just a "matter of seconds" from the time Deputy Williamson emerged from the room where petitioner was until he told the third detective that petitioner wanted counsel. (R.818) The two Decatur detectives who entered the room where petitioner was proceeded to question petitioner and a written confession was obtained from him which was later admitted into evidence over petitioner's objection.[4] (R.1120-24)

The trial jury returned a verdict of guilty and imposed a sentence of death upon petitioner (R.970).

On September 14, 1977 the trial judge held a post-sentence hearing to determine whether or not the jury imposed sentence of death should be reduced. The trial judge stated, "All right, we will proceed now with the case of the State against Billy Ray Williamson on the statutory hearing to determine whether or not a sentence fixed by the jury will be altered." (R.977). At the hearing, the State offered no evidence whatsoever of aggravating circumstances choosing instead to rely solely on the fact that petitioner had been convicted of the offense charged. (R.976-1015). At the hearing the State further stipulated that petitioner had "no significant history of any prior criminal activity." (R.980).

At the post-sentence hearing, petitioner's wife Mrs.Betty Williamson testified. (R.980-1005). Mrs. Williamson testified that petitioner had been employed in construction work and was laid off from time to time when jobs would run out. (R.983) Petitioner was never laid off for any wrong doing on a job. (R.984)

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4 The testimony is in conflict concerning whether, upon being questioned by the two Decatur police detectives, petitioner requested counsel. Petitioner testified that he did request counsel. (R.851) The questioning detectives denied that petitioner requested counsel (R.771). The evidence that the third detective was told of petitioner's desire for counsel prior to the questioning of petitioner by his two associates and that he was standing right outside the room in which petitioner was being questioned is, however, undisputed and uncontroverted.

In 1977 petitioner was employed by the deceased's son and received a salary of $150.00 per week. (R.985). Petitioner's salary from Dr. Davenport was their entire income. (R.986). In 1973, Mrs. Williamson contracted a kidney disease which caused her to swell up and almost go blind. (R.986). In 1976 her condition worsened and in September of that year she went into a coma and both of her kidneys failed. (R.989). She was to have a kidney transplant in January of 1977, but because of fluid around her heart the operation had to be postponed until March. (R.990). In March her kidneys were removed and she had a kidney transplant on April 17, 1977. (R.990). Her body rejected the kidney transplant. (R.990). During the time of her illness, petitioner took her back and forth to Birmingham, took care of the children, cooked meals, tried to clean house, did their laundry and "everything that had to be done". (R.993). During this time, petitioner was also working a full eight hour day. (R.993). At night, from time to time the deceased's son would telephone petitioner and petitioner would have to leave their trailer residence to perform services for the deceased's son. (R.993). In her testimony, Mrs. Williamson described the family's financial situation in April of 1977 (R.996-1002). The Williamson's had payments of $44.00 per month and $28.00 per month to loan companies. They paid a furniture company $68.00 per month. They had medical insurance payments of $13.00 per month and $27.00 and $35.00 every three months. Their utility bills were $30 to $35 per month. Her medicine bills were between $100.00 and $150.00 per month. Her medicine was not covered by insurance. She testified that it costs approximately $80.00 per month to drive to Birmingham for her kidney dialysis treatments. They further had to pay $20.00 per week for a baby sitter when she was in the hospital.

Her total hospital bills between September 1976, and February, 1977 were over $30,000.00. In April, 1977, none of that amount had been paid by insurance.

Mrs. Williamson testified that petitioner came to see her in the hospital in Birmingham (approximately 100 miles one way) as often as he could (R.1003). Petitioner would come during the middle of the week if she was going to have surgery and would always come on the week-ends if he could. (R.1003).

Mrs. Shirley Parker, a neighbor of petitioner and his wife testified at the post-sentence hearing (R.1005-10017). Mrs. Parker testified as to Betty Williamson's medical condition and the worry of the Williamson family over financies. (R.1009). She testified on one occasion shortly before Mrs. Williamson had her kidney transplant, she went to petitioner's trailer to borrow a vacuum cleaner. (R.1010). She testified that she and petitioner were standing outside the trailer and tears came into his eyes and that he said that he didn't know what was going to happen. (R.1010). She further testified that on the Sunday prior to the offense, petitioner came to her trailer and had a cup of coffee with she and her husband. (R.1011). Petitioner was telling them about petitioner's wife and tears came into petitioner's eyes and petitioner just walked out of the trailer. (R.1011). Mrs. Parker further testified that she had never seen petitioner mistreat his wife or children or had seen him intoxicated or had seen him have trouble with anyone. (R.1011).

The following day, the trial judge upheld the sentence of death imposed upon petitioner by the jury. In his order the trial judge found three aggravating circumstances under the Alabama Death Penalty Act; two of which were in essence identical. (1) "The Court finds that the defendant committed the offense charged for pecuniary gain." (2) The "killing of the victim was committed by the defendant while he was engaged in kidnapping the victim for ransom"; and (3) "The offense was especially heinous, atrocious and cruel." The trial judge found that these three aggravating circumstances were sufficient to outweigh the mitigating circumstance that the defendant had "no significant

history of prior criminal activity." The trial judge further stated that "The defendant's need for money for hospital and medical expenses for his wife is a need which is common in society; it was not sufficient to disable the defendant mentally or emotionally, and is insufficient to reduce the punishment for the crime." (R.1041-42). The trial judge then stated that:

> Therefore, the Court finds that there is no legal basis for the Court to change the punishment inflicted by the jury, and the punishment of death is hereby sustained. (R.1042).

On April 4, 1978 the Alabama Court of Criminal Appeals affirmed petitioner's conviction and death sentence, upholding the constitutionality of the Alabama Death Penalty Act. On January 5, 1979, the Supreme Court of Alabama, in a memorandum opinion, affirmed the Court of Criminal Appeals without comment. On February 9, 1979, the Supreme Court of Alabama denied petitioner's application for a rehearing in that Court.

HOW THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner challenged the constitutionality of the Alabama Death Penalty Act and the procedures thereunder in the trial court, the Alabama Court of Criminal Appeals and the Alabama Supreme Court. The Alabama Court of Criminal Appeals, in a written opinion, rejected petitioner's constitutional challenges to the Death Penalty Act and procedures thereunder by a recitation of previous opinions of that Court concerning the constitutionality of the Act.

The Supreme Court of Alabama declined to favor petitioner with a written opinion affirming the Court of Criminal Appeals.

* * *

REASONS FOR GRANTING THE WRIT

Introduction

Alabama's Death Penalty Statute was passed by the 1975 Alabama Legislature. It is codified in Sections 13-11-1 through 13-11-9, Code of Alabama 1975. As it is a post-Furman vs. Georgia, 408 U.S. 238 (1972), but pre-Gregg vs. Georgia, 428 U.S. 153 (1976) enactment, the Alabama Death Penalty Act was passed without the benefit of this Court's opinions in the 1976 death penalty cases.

Under the Alabama Death Penalty Act, the trial jury has but one of two choices. It must either convict the defendant of the capital offense and sentence him to death or acquit him entirely. Unlike non-capital murder defendants in Alabama, a capital defendant charged under the Alabama Death Penalty Act does not have the right to a jury instruction on lesser included offenses. The Alabama Death Penalty Act specifically provides that a capital offense "shall not include any lesser offenses, "Section 13-11-2 (a). The trial jury also does not consider any matters in aggravation or mitigation. The jury's role is simply that if it finds the defendant guilty of the capital offense, "it shall fix the punishment of death," Section 13-11-2(a).

Following imposition of the death sentence by the jury, the trial judge is required to hold a hearing to determine whether he will, "refuse to accept the death penalty as fixed by the jury," Section 13-11-4. In making his decision, the trial judge is required to consider several statutory fixed aggravating and mitigating circumstances, Id. The fact that the jury has sentenced the defendant to death is also specifically given weight by the Alabama Death Penalty Act as a factor to be considered by the trial judge. Among the matters to be considered by the trial judge in determining whether to uphold the sentence of death is the "fixing of the punishment at death by the jury,"Section 13-11-4.

I

THE INABILITY OF THE JURY TO CONSIDER LESSER INCLUDED OFFENSES VIOLATES THE FOURTEENTH AMENDMENT

The trial jury's inability to consider lesser included offenses that can actually be found in a capital case, is a striking departure from conventional Alabama homicide law. Non-capital murder defendants in Alabama are "entitled to have the court charge on the lesser offenses included in the indictment, if there is any reasonable theory from the evidence which would support the position", Fulghum vs. State, 291 Ala. 7, 277 So.2d 886 (1973). In a capital case, however, the jury has one of only two choices. It must either acquit the defendant entirely or return a verdict of guilty and sentence of death. The Alabama Death Penalty Act is the only death penalty statute in the United States which does not allow the jury to consider lesser included offenses. The Alabama Death Penalty Act has been accurately described as a "Kill 'em or

let 'em go free" enactment, see Jacobs v. State, 361 So.2d 640, 649 (Ala. 1978) (Jones, J., dissenting). This lack of lesser offense consideration by the jury renders the Alabama Death Penalty Act violative of both the due process clause and the equal protection clause of the Fourteenth Amendment.

A. Due Process Violation

The effect of the Alabama Death Penalty Act is that if a jury believes that a defendant has committed some degree of homicide, but not capital murder, it is given the Hobson's choice of either acquitting a killer or returning a verdict of guilt and a sentence of death on less than a basis of belief beyond a reasonable doubt. The vice of such a procedure is obvious. Faced with the prospect of loosing a defendant again upon society whom they believe to be guilty of some degree of homicide (but not capital murder), especially when the details of the crime are particularly gruesome or atrocious, a trial jury is highly unlikely to resolve its doubts in favor of the defendant.

The result is that the State is enabled to obtain a capital conviction without proving all of the requisite elements of the offense beyond a reasonable doubt. This erosion of the State's burden of proof violates an Alabama capital defendant right to due process under the Fourteenth Amendment. Under the due process clause the State is required to prove every element of every offense beyond a reasonable doubt, In re Winship, 397 U.S. 538 (1970). In Keeble vs. United States, 412 U.S. 205 (1973), this Court held that the Federal Major Crimes Act could not be construed so as to preclude lesser offense instructions. This Court reasoned that a contrary construction of the Act would expose defendants to a substantial risk of unwarranted convictions. This Court stated:

> "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser included offense instruction - in this context or any other - precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense

> charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." 412 U.S. at 212-13.

This Court in Gregg vs. Georgia, Supra, reaffirmed the constitutional importance of lesser included offense instructions in death penalty cases by rejecting the argument that lesser included offense instructions given capital juries would invest such juries with too much discretion to satisfy the guidelines of Furman. The plurality opinion stated that a capital punishment scheme which, among other things, would preclude lesser included offense instructions, "would be totally alien to our notions of criminal justice" and "would be unconstitutional", Gregg, Supra, 428 U.S. at 199-200, n. 50.

B. Equal Protection Violation

As noted, the prohibition against consideration of lesser included offenses is unique under Alabama law to capital murder prosecutions. Non-capital murder defendants are entitled to lesser offense instructions, Fulghum vs. State, 291 Ala. 7, 277 So.2d 886 (1973). This distinction which singles out capital defendants is violative of the equal protection clause of the Fourteenth Amendment in that it impermissibly burdens two fundamental constitutional rights: (1) The right to all persons to life and (2) the right of an accused to require the State to prove guilt beyond a reasonable doubt.

Rights are fundamental if they are "explicitly or implicitly guaranteed by the Constitution", San Antonio School District vs. Rodriguez, 411 U.S. 1, 33 (1973). The right of all persons to life is explicitly guaranteed by the Fifth and Fourteenth Amendments. The right of an accused to require the State to prove guilt beyond a reasonable doubt is implicitly guaranteed by the due process clause of the Fourteenth Amendment, In re Winship, 397 U.S. 538 (1970). As these rights are fundamental, the disparity promoted by the Alabama Death Penalty Act between capital and non-capital murder defendants must undergo strict scrutiny to determine

whether it is "necessary to promote a compelling governmental interest," Shapiro vs. Thompson, 399 U.S. 618, 634 (1969).

The interest asserted by Alabama in support of the statutory preclusion of lesser offenses in capital cases is Alabama's preception that such is required under Furman vs. Georgia to control undue jury discretion and nullification.[5] However, this asserted justification is fallacious. Gregg vs. Georgia, 428 U.S. 153 (1976) and its companion cases squarely held that the concerns expressed in Furman for consistent capital sentencing could be satisfied by capital punishment statutes permitting juries to consider lesser included offenses, see Gregg, Supra, at 163, 199; Proffitt vs. Florida, 428 U.S. 242, 254 (1976); and Jurek vs. Texas, 428 U.S. 262, 274 (1976). The plurality opinion in Gregg went so far to state that the elimination of lesser included instructions in capital cases would be "totally alien to our notions of criminal justice," and "would be unconstitutional," 428 U.S. at 199-200, n. 50. Therefore, as demonstrated by this Court's decisions in Gregg, Proffitt and Jurek, compliance with the requirements of Furman does not require the extreme approach taken by Alabama in eliminating lesser offense instruction. As lesser offense consideration is constitutionally permissible to satisfy the objectives of Furman, the Constitution requires that this less drastic approach be taken:

> "Statutes affecting constitutional rights must be drawn with 'precision' ... and must be 'tailored' to serve their legitimate objectives .... And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means' ...." Dunn vs. Blumstein, 405 U.S. 330, 343 (1972).

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5 See P. 24 of Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs vs. Alabama, U. S. Sup. Ct. Docket, No. 78-5696.

As previously noted, Alabama's Death Penalty Act is a post-Furman, pre-Gregg enactment-- the obvious reason for the Alabama Legislature's misconception that Furman required such a harsh all-or-nothing approach. Cf. Lockett vs. Ohio, 98 S.Ct. 2954, 2962-63 (1978) (Plurality opinion). The Alabama Death Penalty Act, which forces a jury to acquit a defendant who is obviously guilty of some offense (though doubtfully of the capital offense), or to return a verdict of guilt and a sentence of death in disregard of their oaths when they are not convinced beyond a reasonable doubt of every element of the capital offense begs scrutiny by this Court. Operating as it does, the Alabama capital punishment statutory scheme imperils a capital defendant's right to fair and undistorted fact finding on the issue of his guilt, Cf. Ward vs. Village of Monroeville, 409 U.S. 57, 60 (1972) and makes possible the imposition of the death penalty by virtue of a trial process insufficiently reliable in its selection of defendants who receive that penalty, see Woodson vs. North Carolina, 428 U.S. 280, 305 (1976).

II

THE REQUIREMENT UNDER THE ALABAMA DEATH PENALTY ACT THAT THE JURY AUTOMATICALLY IMPOSE A DEATH SENTENCE UPON A FINDING OF GUILT, WITHOUT CONSIDERATION OF AGGRAVATING OR MITIGATING CIRCUMSTANCES OR LESSER OFFENSES, IS INVALID UNDER THIS COURT'S DECISIONS HOLDING MANDATORY DEATH PENALTY STATUTES UNCONSTITUTIONAL.

Under the Alabama Death Penalty Act the trial jury, upon finding a defendant guilty of a capital offense, is required to "fix the punishment at death," Section 13-11-2(a), Code of Alabama 1975. The trial jury is not permitted to consider any lesser offenses nor is it permitted to consider any circumstances in aggravation or mitigation in imposing its sentence. In such, under the Alabama Death Penalty Act, the trial jury is placed precisely in the same position as the trial jury in Woodson vs. North Carolina, 428 U.S. 280 (1976). The jury must either convict and sentence to death or it must acquit.

Under such a procedure, "it is only reasonable to assume that many juries ... will continue to consider the grave consequences of a conviction in reaching a verdict." Woodson, Supra, 428 U.S. at 303, and will exercise a "de facto sentencing discretion," Stanislaus Roberts vs. Louisiana, 428 U.S. 325, 335 (1976), in refusing to convict obviously guilty defendants whom they do not feel deserve to die. This assumption is not unwarranted. In fact, it has been judicially observed by the Alabama Supreme Court in connection with the Alabama Death Penalty Act. In Jacobs vs. State, 361 So.2d 640 (Ala. 1978), the Alabama Supreme Court stated:

> "We are further convinced that trial juries will consider the serious consequences of a guilty verdict and will either refuse to fix the penalty at death, or will acquit the defendant." 361 So.2d at 645.

It is no answer to say, as the Alabama Supreme Court has said in considering the Alabama Death Penalty Act, Jacobs vs. State, Supra, at 644, that the post-jury verdict judicial hearing on aggravating and mitigating circumstances remedies this deficiency. The crucial fact overlooked by the Alabama Supreme Court is that this hearing comes only after the imposition of an either/or jury verdict, unfettered by any standards to guide its imposition. An Alabama jury, unable to consider lesser offenses or mitigating and aggravating circumstances and faced only with the either/or decision of imposing the death penalty, will exercise the arbitrary and capricious discretion condemned by Woodson and Roberts in determining who they shall convict and who they shall acquit entirely. The trial jury is not even told that a post sentence hearing is to be held by the trial judge.[6]

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[6] No mention whatsoever was made by the trial judge during his charge of the availability of the post-sentence hearing. The trial judge merely told the jury" ... if you determine that the evidence in the case proves him guilty beyond a reasonable doubt of the offense which has been charged, the only punishment which is available under this law is death by electrocution. There is no alternative as to the punishment if the defendant is found guilty..." (R. 958).

The fact that Alabama trial judges later review death sentences at a post-verdict hearing is of no matter. As in Woodson, "there is no way under (Alabama) law for the judiciary to check arbitrary and capricious exercise of (the power to determine who shall receive the death penalty and who shall not) through a review of death sentences," Woodson, Supra, 428 U.S. at 303. Under the Alabama Death Penalty Law the constitutional damage will already have occurred. By the time the trial judge holds a post-verdict to determine whether or not the death sentence should be upheld, the jury has already been forced to make the unguided decision condemned by Woodson - that is, the unstandardized and unchecked decision either to convict the defendant and sentence him to death or acquit him entirely. As Justice Jones of the Alabama Supreme Court wrote in dissent in Jacobs vs. State, Supra, the trial judge's "subsequent consideration of mitigating factors cannot rectify the unconstitutionally unreliable sentence already imposed," 361 So.2d at 650.

III

FAILURE OF ALABAMA'S CAPITAL SENTENCING PROCEDURE TO REQUIRE PROOF OF AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT RENDER SUCH PROCEDURE UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT AND LACKING IN THE "RELIABILITY" REQUIRED UNDER THIS COURT'S DECISIONS FOR CAPITAL SENTENCING PROCEDURES.

Under the Alabama Death Penalty Act, the State is not required to prove beyond a reasonable doubt the existence of aggravating circumstances necessary to justify imposition of the death penalty at the post-sentence hearing. Instead, a trial judge who upholds the sentence of death must merely list "one or more of the aggravating circumstances ... which (he) finds exists" and "any of the mitigating circumstances ... which (he) finds insufficient to outweight the aggravating circumstances," Sections 13-11-4(1)-(2), Code of Alabama 1975. Petitioner's sentence of death imposed under a capital sentencing procedure lacking this requirement of proof is invalid. Alabama's capital sentencing procedure is both violative of the Fourteenth Amendment and lacking in the

"greater need for reliability" required in capital sentencing procedures by Woodson vs. North Carolina, 428 U.S. 280 (1976).

A. Violation of Due Process

In Gardner vs. Florida, 430 U.S. 349, 358 (1977), this Court made it clear that "The sentencing rocess, as well as the trial itself, must satisfy the requirements of the due process clause." See also, Presnell vs. Georgia, 58 L.Ed.2d 207, 211 (1978). An accused's right to require the State to prove its case against him beyond a reasonable doubt is a right guaranteed by the due process clause, In re Winship, 397 U.S. 358 (1970). All of the Death Penalty Statutes upheld by this Court in the 1976 death penalty cases contained this constitutionally guaranteed safeguard. The Death Penalty Statutes of Georgia[7] and Texas[8] by their own terms required proof beyond a reasonable doubt of aggravating circumstances. The Florida Supreme Court had previously interpreted the Florida Death Penalty Statute as carrying with it an implicit requirement that aggravating circumstances be proved beyond a reasonable doubt.[9] No such requirement exists under the terms of the Alabama Death Penalty Act and no decision of either the Supreme Court of Alabama or the Alabama Court of Criminal Appeals has construed the Statute as implicitly requiring proof beyond a reasonable doubt of aggravating circumstances.

As a result, petitioner's sentence of death in this case was imposed totally without any requirement of a determination by the sentencing authority that the aggravating circumstances relied upon to justify the imposition of the death penalty had been proven beyond a reasonable doubt. The trial judge gave no indication either at the post-sentence hearing or in his order upholding the jury's sentence of death that the aggravating circumstances which he found to be present had been proven beyond a

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7 Ga. Code Ann., Section 27-2534.1(c)

8 Tex. Penal Code, Art. 1257 (1973) (superceded by Tex. Penal Code, Art. 19.03)

9 Dixon v. State, 283 So.2d 1, 9 (Fla. 1975)

reasonable doubt. (R. 976-1015, 1039). Indeed, there exists from the record no hint that the trial judge even considered that such a standard of proof existed.

It is no answer to argue that the overlap under the Alabama Death Penalty Act between the list of aggravated capital offenses and the list of aggravating circumstances remedies this deficiency. Alabama may try to argue that because of the overlap, conviction of a capital offense during the trial phase of a capital case ipso facto renders at least one aggravating circumstance proven beyond a reasonable doubt - thus negating need for a requirement of proof beyond a reasonable doubt during the penalty phase of the trial. However, because of the way the Alabama Appellate Courts have construed the Alabama Death Penalty Act, this argument is fallacious. The Alabama State Courts have ruled that this bootstrapping method of proof of aggravating circumstances cannot be employed under the Alabama Death Penalty Act. The Court of Criminal Appeals has explicitly held that the crime charged in the indictment cannot be used both as the capital offense and later as an aggravating circumstance in the penalty phase of the case to justify imposition of the death penalty, see Woodrow Wilson Keller, Jr. vs. State, _____ So.2d _____, (Ala. Crim. App., February 20, 1979).

B. Lack of Reliability

The failure of Alabama's Death Penalty Act to require proof of aggravating circumstances beyond a reasonable doubt also renders the sentencing procedure under the Act defective under the "greater need for reliability" criterion mandated for sentencing procedures in capital cases by Woodson vs. North Carolina, 428 U.S. 280 (1976). The nature of the death penalty is such that a capital sentencing procedure must contain safeguards over and beyond those employed in non-capital cases to insure that the sentence imposed thereunder is warranted and appropriate. As observed by Mr. Chief Justice Burger in Lockett vs. Ohio:

"We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability where the death sentence is imposed," 57 L.Ed. 2d 973, 989 (1978).

See also Gardner vs. Florida, Supra, 430 U.S. at 364. (White, J., concurring.)

The logical requirement of the "greater need for reliability" requirement under Woodson for capital sentencing procedures is that the aggravating circumstances necessary to justify imposition of the death penalty be proved beyond a reasonable doubt during the penalty phase of the case. It has been so held. State vs. Simants, 250 N.W.2d 881 (1977). In Simants the Nebraska Death Penalty Statute, like the Alabama Statute, did not specifically require proof beyond a reasonable doubt of aggravating circumstances. Citing the "greater need for reliability" test of Woodson the Nebraska Supreme Court construed the "intent of the Act" to require proof of aggravating circumstances beyond a reasonable doubt, 250 N.W.2d at 888. However, as noted, no Alabama appellate court decision has so construed the Alabama Death Penalty Act. As a result, since the enactment of Alabama's post-Furman Death Penalty Act every death sentence imposed in Alabama, including petitioner's, has been imposed without this procedure of safeguard required by the "reliability" test of Woodson.

This aspect of petitioner's case palpably merits certiorari. A death sentence imposed upon petitioner under such constitutionally dubious circumstances requires review by this Court. This Court should accept certiorari in this case, if, for no other purpose, than to remand this case to the Alabama Supreme Court to determine whether (1) the Alabama Death Penalty Act can be read to implicitly require proof beyond a reasonable doubt of aggravating circumstances and if so, (2) to require that Court to seek a determination from the trial judge whether or not the aggravating circumstances relied upon by him to impose the death penalty in petitioner's case were so proven.

IV

"STACKING" OF AGGRAVATING CIRCUMSTANCES AND USE AS AN AGGRAVATING CIRCUMSTANCE WERE PROOF OF CONVICTION OF THE CRIME CHARGED IN THE INDICTMENT RAISES SUBSTANTIAL QUESTIONS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT

The sentencing procedure employed in a capital case must comport with the requirements of the due process clause, see Gardner vs. Florida, 430 U.S. 349 (1977) and must, because of the nature of the death penalty, be sufficiently "reliable" to determine that death is the appropriate punishment, Woodson vs. North Carolina, 428 U.S. 280 (1978). In two separate respects, the post-verdict sentencing procedure employed by the trial judge in petitioner's case was defective under both criteria.

First, the trial judge found as two of the three aggravating circumstances justifying the imposition of the death penalty the identical thing - that petitioner had committed the offense charged for financial gain. The trial court found both as an aggravating circumstance that petitioner committed the offense "for pecuniary gain" and that the offense was committed while petitioner was "engaged in kidnapping the victim for ransom." In so doing, the trial judge "stacked" two identical aggravating circumstances thus doubling the weight and importance of the single underlying factual circumstance. Second, the trial judge in essence justified the imposition of the death sentence upon the mere fact that petitioner had been convicted of the offense charged. In finding as an aggravating circumstance that "The willful killing of the victim was committed by the defendant while he was engaged in kidnapping the victim for ransom," the trial judge merely repeated the substantive charge for which petitioner was indicted and convicted - "kidnapping for ransom or attempts thereof when the victim is intentionally killed by the defendant." As a result, merely the fact that petitioner was found by the jury to have committed the crime charged in the indictment was in itself explicitly deemed sufficient by the trial judge to uphold the

jury's sentence of death.[10]

Both of the above procedures utilized by the trial judge during the sentencing phase of petitioner's case have been condemned by the Alabama appellate courts in other cases and made the basis for reversal of death sentences.[11] In regard to the first procedure, in Cook vs. State, 369 So.2d 1251, 1257 (Ala. 1979), and Roger Scott Thomas vs. State, _____ So.2d _____, n. 1, (Ala. Crim. App., March 27, 1979), the Supreme Court of Alabama and the Alabama Court of Criminal Appeals respectively held that a trial judge could not "stack" aggravating circumstances by creating two separate aggravating circumstances out of the same set of facts - i.e., the trial court was reversed in both cases for finding as two separate aggravating circumstances that the offense charged was committed during a robbery and that the offense charged was committed for pecuniary gain. Further, in regard to the second procedure, the Alabama Court of Criminal Appeals in Woodrow Wilson Keller, Jr. vs. State, _____ So.2d _____ (Ala. Crim. App., February 20, 1979), specifically held that a trial judge cannot use the crime charged in the indictment as an aggravating circumstance during the penalty phase of the trial. The Court of Criminal Appeals stated:

> "The first aggravating circumstance describes the crime charged in the indictment and cannot be used both as the criminal charge and the circumstance aggravating that charge." Ms. Op. 16-17.

The State presented no evidence whatsoever at the post-sentence hearing in this case. (R. 1013). The State further stipulated that petitioner "had no significant history of any prior criminal activity." (R. 980). The evidence further tended

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10 A "finding by the trial judge of only one aggravating circumstance is sufficient to sustain the death penalty" under the Alabama Death Penalty Act, Woodrow Wilson Keller, Jr. v. State, ____So.2d _____ (Ala. Crim. App. February 20, 1979, Ms. Op. at 17.)

11 Petitioner specifically raised these issues before the Alabama Supreme Court in his application for rehearing in that Court. However, that Court simply denied his application for rehearing without an opinion, see Appendix B.

to show that petitioner committed the crime charged to obtain money to pay the huge medical bills the family had incurred due to his wife's catastrophic illness. This fact was specifically noted by the trial judge in his sentencing order. (R. 1042). The circumstances of petitioner's case were clearly such that called for reduction of the death sentence to life imprisonment without parole as is permitted under the statute.

Instead, to uphold the petitioner's sentence of death, the trial judge was forced into a strained and erroneous interpretation of the Alabama Death Penalty Act to find aggravating circumstances sufficient to justify the jury's verdict. The trial judge's misconstruction and misapplication of the sentencing procedure under the Alabama Death Penalty Act strongly merits review by this Court to determine whether the "reliability" required by Woodson and Lockett was present in petitioner's case and to determine whether petitioner was denied due process of law.

V

ADMISSION INTO EVIDENCE OF AN INCULPATORY STATEMENT MADE BY PETITIONER DURING INTERROGATION FOLLOWING A REQUEST BY PETITIONER FOR COUNSEL RAISES SUBSTANTIAL QUESTIONS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

This case presents to the Court a situation where a confession made by an accused during police interrogation after police had been made aware that the accused had requested counsel was admitted into evidence over the objection of the accused. The undisputed evidence presented at the trial below established the following:

Petitioner was initially arrested in DeKalb County, Alabama, by his brother, Jim Williamson, who is a DeKalb County Deputy Sheriff. (R. 841). Following his arrest, petitioner was transported by Deputy Williamson to the DeKalb County Jail where they were joined by the DeKalb County Sheriff. (R. 812). Along the way, petitioner was advised of his Miranda rights by Deputy Wil-

liamson. (R. 812). After being warned of his rights, petitioner stated that he wanted a lawyer. (R. 817). After he was joined by the Sheriff at the DeKalb County Jail, Deputy Williamson transported petitioner to Decatur, Alabama, where petitioner was turned over to Decatur Police authorities. (R. 813-814). After turning petitioner over to the custody of the Decatur Police, Deputy Williamson asked if he could speak to petitioner alone. (R. 815). Deputy Williamson and petitioner went into a small narcotics room and talked. (R. 815). After talking to petitioner, Deputy Williamson emerged from the narcotics room and informed a Decatur Police Detective standing outside of the room that he had advised petitioner of petitioner's constitutional rights and petitioner had stated that he wanted a lawyer. (R. 817). The Decatur Police Detective with whom Deputy Williamson spoke said "something to the effect that they would read his rights to him again". (R. 817). As Deputy Williamson had left the room where he had been talking alone with petitioner, two Decatur City Detectives entered the room and began questioning petitioner. (R. 765). Deputy Williamson testified that it was only a "matter of seconds" from the time he emerged from the room in which he had been speaking to petitioner until he informed the Decatur detective that petitioner desired counsel. (R. 818).

The only dispute in the testimony concerns what happened after the two Decatur detectives entered the room to question petitioner. According to petitioner's testimony he again requested counsel. (R. 851). According to the police, he did not. (R. 771). However, it is undisputed that the Decatur police authorities were aware, through Deputy Williamson, that petitioner desired counsel and had requested counsel prior to the interrogation.

During the interrogation of petitioner by the two Decatur Police Detectives, petitioner gave an inculpatory statement which was later admitted into evidence against him over his objections.

The statement was erroneously admitted into evidence. This Court in Miranda vs. Arizona, 384 U.S. 436, 474 (1966) and later in Michigan vs. Moseley, 423 U.S. 96, 104 (1975), n. 10, stated the clear requirement that when a person in custody makes known his desire for counsel all interrogation must cease. This Court stated:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

Unlike the situation that is presented when a person in custody merely states that he wishes to remain silent, a different situation is presented when a person in custody indicates a desire for counsel. In the latter situation, this Court has established a per se rule that all questioning must cease when desire for counsel is made known. This Court clearly differentiated between the two situations in Michigan vs. Moseley, Supra, 423 U.S. at 104.

> "[The Court in Miranda] distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only 'if the individual states that he wants an attorney'."

This Court in Brewer vs. Williams, 430 U.S. 387 (1977) specifically did not decide the issue presented by this case. This case squarely places the issue before the Court once again. This time, however, the issue is presented in a death penalty case - thus increasing the importance for a decision of the issue.

CONCLUSION

For the reasons stated herein, petitioner respectfully

requests that a writ of certiorari be granted.

Dated: July 2, 1979

Respectfully submitted,

BUTLER & POTTER

Julian D. Butler

Julian D. Butler

George W. Royer, Jr.

George W. Royer, Jr.

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APPENDICES

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BUTLER & POTTER

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1977-78

8 Div. 3

Billy Ray Williamson

v

State

Appeal from Morgan Circuit Court

TYSON, JUDGE

Billy Ray Williamson was indicted under Alabama's Death Penalty Statute (Act No. 213, General Acts of Alabama, 1975, Title 15, Sections 342(3) - 342(11), Code of Alabama 1940, as amended)[1] for the kidnapping and first degree murder of one Jessie Davenport. The jury found the appellant guilty as charged, and the trial court thereafter conducted a post-conviction hearing on the aggravating and mitigating circumstances, as required by law. The trial judge then set punishment at death by electrocution.

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1. Death Penalty Act is now 13-11-2 through 13-11-9, Code 1975.

Mary Ann Griffin testified that on April 25, 1977, she was employed by Dr. Felton Davenport as a receptionist. Miss Griffin stated that on this date, around 7:40 a. m., she arrived at work. As she got out of her car, Mr. Jessie Taft Davenport (the deceased) called her over to his truck. She walked over to Mr. Davenport's truck and noticed that the appellant was seated with him. Mr. Davenport asked her to tell his son, "Doc" Davenport, that he would be at the Kimberly Trailer Court with the appellant, working on a little problem which had arisen. Williamson, according to Miss Griffin, was resident manager at the trailer park.

June Knox stated that she lived at the Kimberly Trailer Park in Decatur, Alabama, on April 20, 1977. She stated that on this date she saw "Pop" Davenport, along with the appellant and another man, around 8:30 a. m., working at the park's treatment plant.

Judy Smith indicated that she was a dental assistant, employed by Dr. J. Felton Davenport. Miss Smith stated that on April 25, 1977, around 10:45 a. m., she received a telephone call at the dental office. When she answered the phone, the caller asked to speak with "Doc" Davenport about his father. According to Miss Smith, she buzzed "Doc" Davenport back in the lab and he answered the call.

Dr. J. Felton Davenport testified that he had known the appellant since 1971 and that the appellant had been employed by him and his father for several years as a "handy-man" before he became the resident manager of the trailer park. Dr. Davenport stated that he received the phone call on April 25, 1977. He stated that the caller was holding his father for ransom and told him if he contacted the police he would never see his father again. Dr. Davenport related that the caller said he would give further instructions to him later and then hung up the phone. Dr. Davenport testified that he notified the police.

Dr. Davenport indicated that around 7:20 p. m. that same day he received a second phone call at his residence. The voice

sounded to him as if it were the same man with whom he had spoken earlier in the day. Dr. Davenport related that he was told by the caller to go to a cabin at Rivermont Oaks (a new subdivision) and place $100,000.00 in a brochure box, then wait. According to Dr. Davenport, the voice on the phone was not that of the appellant.

Mrs. Doris Seibert testified that she was employed as a bookkeeper for Dr. Davenport. She stated that on April 25, 1977, around 11:00 a. m., she and Marie Aldridge (her assistant) left the office to look for Mr. Davenport. They found his truck in the Southland Plaza Shopping Center parking lot in Decatur, Alabama, around 11:45 a. m.

Andrea Jane Loosier testified that she lived at Lot No. 22, Kimberly Court, in Decatur, Alabama. Mrs. Loosier stated that on April 25, 1977, around 8:00 p. m., she went to the appellant's trailer to dry some clothes. While there Mrs. Loosier indicated that the following occurred (R. pp. 582 - 585):

> "Q. Would you relate to the ladies and gentlemen of the jury the facts and substance of this conversation that you had with the defendant there in his trailer on the night of Monday, April 25, 1977?
>
> "A. Well, I was sitting there while my clothes dried and I had made a phone call, had used their phone to make a phone call and the television was on and Mr. Williamson said to me 'Would you do me a favor' and I said, 'I will if I can,' and he said, 'Would you pick up a package for me?' You know, I thought the post office or something is all that run through my mind at the time and I said, 'Where do I have to go?' He said, 'A little ways out of town.' You know, then that confused me and I said, 'What is it?' He didn't give me no answer then and so I asked him why he didn't go after it and he said that his car and truck had already been seen around town too much and I said, well, I didn't know where to go or anything and he said he would tell me where to go. I said, 'Well, if I go is there anything in it for me?' And he said, 'A hundred dollars.' So, immediately my mind related to drugs, narcotics being in a package that would be out in the woods some place is what came to my mind and so I said to him, I said, 'Well, is it drugs in there? Is it drugs what it is?' He never really said yes, but he -- during the conversation he let me believe that it was narcotics in the package until the time that I heard it on the radio I --

> "MR. BUTLER: We object, Your Honor.
>
> "THE COURT: All right. Stop at that point.
>
> "Q. Tell us the substance of the conversation.
>
> "A. Well, I thought it was -- like I said, I thought it was narcotics in a package. So, I told him, I said, 'Well, can you get any time for it,' and he said, 'About twenty years in the pen,' so that made me even more believe it was narcotics. So I told him, I said, 'Bill, man, that ain't no way to go, not drugs,' and he said, 'Well, I got to pay these bills some way or got to have some money some way.' I am not really sure exactly of the words, and so he said, 'Would you do it for two hundred dollars?' Then at this time he said that he would go with me and that all I would have to do is just drive the car, back it up and he would get out and get this package and get back in the car. For two hundred would I go for the two hundred dollars. I said, 'No, I need the money but I can't use no twenty years in the penitentiary for getting caught,' and I said, 'What if you got caught out there,' and he said, 'Well, if you go and we get caught, I have never seen you and I don't know who you are and run like hell.' So, at that time I refused. I still wouldn't go and I got up and left at this time."

Mrs. Loosier indicated that she telephoned a woman friend who worked for the Police Department on April 28, 1977. Two detectives came to see her. Mrs. Loosier advised that she informed the two of them of what had transpired between the appellant and herse

Bobby Ray Albrecht testified that on April 25, 1977, the appellant came to his trailer around 10:00 p. m. Albrecht stated that the appellant told him that he wanted to take a ride, so the two of them got in Albrecht's car and drove off. The appellant gave directions, and this ride ended near Rivermont Oaks. The appellant stated that he was going to take a walk and for him to be back within twenty minutes. Albrecht stated that he drove about for twenty minutes and upon his return the appellant got in the car and told him to hurry up and drive. He did so, and they went back to the trailer park.

Albrecht testified that on Tuesday, April 26, 1977, around lunch time, Williamson came to his trailer while he was playing cards with some friends. The appellant sat down for a few minutes and then left. Albrecht stated that around twenty-five minutes later his friends left and he went to appellant's trailer to find out what he wanted. Albrecht indicated that Williamson was outside his trailer and the following conversation took place (R. p. 597):

> "A. He asked me if I wanted to make twenty-five thousand dollars. Said all I had to do was make a telephone call and tell him where to deliver the money and pick it up and bring it back to him and he would count me out twenty-five thousand dollars then."

Albrecht testified that he told the appellant he would think about it and he never saw him again.

Wallace L. Higgins testified that he was employed as a special agent with the Federal Bureau of Investigation, Gadsden, Alabama, Division. Higgins stated that on Wednesday, April 27, 1977, he went to the home of Bradley Eugene Jackson in Fort Payne, Alabama. There Higgins conducted a search of a 1969, bronze colored Dodge Charger at this residence. In searching the vehicle, Higgins indicated he found a paper bag which contained a light blue shirt and two sport coats.

Brent Wheeler testified that he was employed as criminologist by the State of Alabama for the Department of Toxicology and Criminal Investigation. Wheeler advised that he participated in the search of a 1969 Dodge Charger in Fort Payne, Alabama, on April 27, 1977. He stated that one white canvas shoe, one blue shirt, one three-quarters by eighteen and one-half inch pipe, one R. C. drink bottle, one brochure map of Rivermont Oaks, and one piece of a trunk mat, all of which had blood stains on them, were found in the automobile. Wheeler stated that he also removed some hair from the trunk of the automobile. He indicated the hair in the trunk matched that of Jessie Davenport. All of these items were later turned over to Toxicologist Martha Odom.

James Wayne Kyker, a detective with the City of Decatur, testified that he participated in the investigation of Jessie Taft Davenport's disappearance. This investigation led him to a wooded area in Cullman, Alabama, where he found the body of Jessie Taft Davenport.

James M. Buttram, State Toxicologist, testified that on April 28, 1977, he conducted a post-mortem examination of Jessie Taft Davenport. Buttram related that Davenport's death was the result of multiple blunt force blows delivered to the head which caused multiple breaks or fractures, resulting in hemorrhaging within the skull.

Martha Odom, State Toxicologist, testified that she examined the tennis shoe, blue shirt, piece of pipe, R. C. drink bottle, and trunk mat found in the 1969 Dodge Charger belonging to Bradley Eugene Jackson. Mrs. Odom stated that the blood type found on the items matched that of deceased.

Dr. J. Felton Davenport was recalled and stated that the piece of pipe found in the 1969 Dodge Charger was the same pipe used to shut off sewage drainage from Kimberly Court at the treatment plant.

Kenneth D. Collier testified that he was a police officer with the City of Decatur. Collier related that he took Williamson's confession on April 30, 1977, at Police Headquarters. Detective Robert Clark assisted Collier by reading the appellant his "Miranda" rights. The appellant responded that he understood them. The appellant, according to Collier, then read over and signed a voluntary waiver of these rights. Collier related that there were no threats, coercion, intimidation, or inducement made or offered the appellant in order to obtain this statement or to sign the waiver of rights form. Williamson, according to Collier, never mentioned wanting a lawyer. Collier stated that Williamson admitted hitting Davenport with a pipe on the head and that Bradley Eugene Jackson was his partner in the kidnapping of Davenport.

Mrs. Coralee Williamson, mother of appellant, testified that her son came to her home in Fort Payne, Alabama, on Saturday, April 30, 1977. Mrs. Williamson stated that the appellant was wet, muddy, unshaven, and acted as if he were in "a shock of mind." The appellant, according to his mother, left with his brother, Jim Williamson, a deputy sheriff of Dekalb County, after he drank a cup of coffee.

Jim Williamson, Deputy Sheriff of DeKalb County, testified that he placed his brother under arrest on April 30, 1977, at his mother's home in Fort Payne, Alabama. Jim Williamson stated that he took the appellant to Dekalb County Sheriff Ables' home. In route, the appellant told Jim Williamson that he needed a good lawyer. While at Sheriff Ables' home, Jim Williamson indicated that the Sheriff advised the appellant of his "Miranda" rights also. Jim Williamson indicated that the three of them then drove to Decatur, Alabama, stopping only to eat dinner at a small cafe in Scottsboro, Alabama.

After their arrival at Decatur City Hall, Jim Williamson was allowed to talk with the appellant privately in the narcotics room for a few minutes. Jim Williamson testified that when he came out of this room he told Detective Ward that the appellant wanted a lawyer and that Ward stated that they would read his brother his rights again. Ward did not testify at trial.

Billy Ray Williamson, the appellant, testified at the suppression hearing. He indicated that he could read and write a few small words and was blind in one eye. The appellant said that he had only a few hours sleep during the three days before he was taken into custody by his brother. Also, he stated that he had spent the two previous nights before his arrest in the woods. The appellant stated that Detectives Collier and Clark did not read him his rights until after he had signed a piece of paper that they directed him to sign. The appellant said he asked for a lawyer and was told by Detectives Collier and Clark that he did not need one and that all he had to do was to sign the paper, then he could get some rest. The appellant testified that when he signed the

paper he did not understand that he was giving up his rights against self-incrimination or to have a lawyer present under the United States Constitution. Also, the appellant denied making the statement which he signed.

I

The appellant contends that the Alabama Death Penalty Statute is unconstitutional because the trial jury could not consider the aggravating or mitigating circumstances, thus the death penalty is mandatory and therefore violative of the Eighth and Fourteenth Amendments to the United States Constitution.

The constitutionality of the present Alabama Death Penalty Statute was upheld by this Court in Jerry Wayne Jacobs v. State (Ala. Cr. App.), 6 Div. 389, Ms. July 26, 1977; and subsequently upheld in John L. Jacobs v. State (Ala. Cr. App.), 6 Div. 383, Ms. October 4, 1977, remanded for further proceedings; Wayne Eugene Ritter and John Louis Evans III v. State (Ala. Cr. App.), 1 Div. 837, Ms. October 25, 1977; Recardo Cook v. State (Ala. Cr. App.), 6 Div. 489, Ms. December 6, 1977; and Tommy Milton Wilson, alias Tommy Wilks v. State (Ala. Cr. App.), 1 Div. 866, Ms. February 21, 1978. The appellant has not asserted any grounds for invalidating the statute in question which this court has not previously considered, thus we adhere to the views heretofore expressed on this issue.

II

The appellant contends that the trial court erred in granting the State's challenge for cause as to two prospective jurors.

The pertinent statute covering these challenges provides:

> " 57. Additional ground of challenge in certain cases in favor of state. - On the trial for any offense which may be punished capitally, or by imprisonment in the penitentiary, it is a good cause of challenge by the state that the person has a fixed opinion against capital or penitentiary punishments, or thinks that a conviction should not

be had on circumstantial evidence; which cause of challenge may be proved by the oath of the person, or by other evidence." Title 30, § 57, Code of Alabama 1940, Recompiled 1958, now § 12-16-152, Code of Alabama 1975.

In Witherspoon v. Illinois, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776, and recently in Davis v. Georgia, ___ U. S. ___, 97 S. Ct. 399, ___ L. Ed. 2d ___ (1976), the United States Supreme Court held that "[U]nless a venireman is irrevocably committed,before the trial has begun, to vote against the penalty of death, regardless of the facts and circumstances that might emerge in the course of the proceedings," 391 U. S. at 522, n. 21, 88 S. Ct. at 1777, he may not be excluded.

In his examination, the district attorney asked the following questions of Jimmie Atkins (R. pp. 51 - 52):

"MR. MOEBES: Mr. Jimmie Atkins, do you feel that you would never under any circumstances vote as a juror for a death penalty?

"MR. MOEBES: Would you refuse to apply the death penalty no matter how strong the evidence and under all circumstances in any case?

"JUROR: Yes, sir.

"MR. MOEBES: Would you automatically vote against the death penalty without regard to any evidence that might be developed at the trial of the case before you as a juror?

"JUROR: Yes, sir.

"MR. MOEBES: Would your attitude toward the death penalty prevent you from making an impartial decision as to the defendant's guilt?

"JUROR: Yes."

As to the prospective juror Jacky L. Snow, the trial judge asked the following questions (R. pp. 404 - 405):

"THE COURT: That's not the question. The United States Supreme Court says people that don't believe in the death penalty can serve on the jury but there is a question of whether or not you are so strongly against it you are not going to listen to the evidence and not going to inflict it regardless of what the evidence is. Now, do you fit into that category?

"JUROR: I would listen to the evidence given.

"THE COURT: What?

"JUROR: I would listen to the evidence given.

"THE COURT: Well, after you heard the evidence and it proved -- I am not saying it will by any means, but if it proved without a doubt that the defendant was guilty would you vote for the death penalty?

"JUROR: No.

"THE COURT: Pardon?

"JUROR: No.

"THE COURT: Would you vote to convict if you knew that the inevitable result would be the death penalty?

"JUROR: No.

"THE COURT: All right.

"MR. MOEBES: We challenge for cause.

"THE COURT: I will grant the challenge. You can be excused unless you are called for another case."

It thus appears from the record that both Atkins and Snow were irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might emerge during the trial. Therefore, the trial court did not err in granting the State's challenges for cause as to these two prospective jurors.

III

The appellant contends that the trial court erred in refusing to grant a motion for a continuance based on some allegedly highly prejudicial newspaper articles appearing in The Decatur Daily.

One hundred jurors were summoned for jury duty in the trial of this case. The jurors were divided into groups of twelve and each group was interrogated on voir dire as a group, while the remainder stayed in a jury lounge. After voir dire of the fourth group of these jurors, the court recessed until the following day and each prospective juror was allowed to go to his or her home. The next day, Tuesday, August 30, 1977, the appellant made a motion for a continuance based upon the allegedly highly prejudicial newspaper articles appearing in The Decatur Daily on August 29, 1977.

The trial court, before ruling on the motion, recalled the forty-six prospective jurors remaining and questioned them in regard to the newspaper articles. Twenty of the forty-six prospective jurors stated that they had read the articles. The trial court then asked the following questions after which the trial court asked additional questions of the jurors submitted by appellant's counsel to the trial judge (R. pp. 527 - 528):

> "THE COURT: All right. Now, the ones who read or saw or heard anything about this case in the news media, please tell me if you saw anything which would affect your opinion or your ability to sit in fair judgment on this case. If you saw anything that would affect your opinion the way that you would judge the evidence under the law, please raise your hand.
>
> "(No answer from venire.)
>
> " THE COURT: Did any of you see anything which you did not already or had not already heard or did not already know about this case in any of these news reports that you might have seen or heard? If so, raise your hand.
>
> "(No answer from venire.)
>
> "THE COURT: Do each of you feel that you could sit in fair judgment on the evidence in this case and decide it according to the law as given you by the Court after seeing the news reports or hearing the news reports since you were qualified yesterday. If you could not, please raise your hand. If you have been adversely affected by that or by anything else since you were qualified yesterday, please raise your hand.
>
> "(No answer from venire.)
>
> "THE COURT: Have you had any contact with any -- I will ask all members of the group, have you had any contact or come into contact with any information whatsoever of any kind which would change your thinking in regard to how you could sit and judge the evidence in this case?
>
> "(No answer from venire.)
>
> "THE COURT: Has there been anything adverse to the defendant which has come to your attention by the news media or anything else since you were qualified which would make it detrimental to the defendant in any manner if you sat in judgment on this case?
>
> "(No answer from venire.)

> "THE COURT: Will you be able to give a fair and impartial judgment according to the instructions of the Court at this time if you are selected to serve on the jury?
>
> "(No answer from venire.)"

The trial court has wide discretion in whether or not to grant a continuance and such discretion will not be revised in the absence of a clear abuse of discretion. Jenkins v. State, Ala. Cr. App., 337 So. 2d 72 (1976), and authorities cited. Further, the appellant has the burden of showing a prejudicial influence which the publicity has caused before a trial court will be held in error. Mayola v. State, Ala. Cr. App., 344 So. 2d 818 (1977); Botsford v. State, 54 Ala. App. 482, 309 So. 2d 835, cert. denied 293 Ala. 745, 309 So. 2d 844 (1974). Here, the appellant failed to show what, if any, prejudicial effect the newspaper articles had on the prospective jurors. Murphy v. Florida, 421 U.S. 794; Dolbert v. Florida, No. 76-5306, __ U. S. __, June 17, 1977.

Each juror indicated that he would render a verdict based solely on the evidence at trial.

Therefore, the trial court did not err in denying appellant's motion for a continuance.

IV

Appellant next contends that the trial court erred in allowing appellant's signed written confession into evidence. According to appellant, his constitutional rights, as established by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, were violated.

The appellant was taken to the Decatur City Hall by his brother, Deputy Jimmy Williamson, and Dekalb County Sheriff Ables. Williamson testified that before leaving for the Decatur City Hall the appellant told him that he needed a good lawyer after he advised him of his rights (R. p. 816). Also, Sheriff Ables advised the appellant of his rights.

Jim Williamson was allowed to talk with the appellant (his brother) for ten to fifteen minutes in the narcotics office (R. p. 757). Deputy Williamson stated that when he came out of the narcotics office he told Sergeant Ward that the appellant wanted an attorney (R. p. 817).

Detective Kenneth Collier testified that he and

Detective Robert Clark entered the office where the appellant was located after Deputy Williamson came out. There is no evidence that either Ward or Williamson informed Clark or Collier that the appellant wished to speak with an attorney. The appellant was read his constitutional rights once again, this time by Detective Collier (R. p. 758). After Detective Clark asked the appellant if he understood what he had read him and understood his rights, the appellant stated he did and then signed a waiver of rights form (R. p. 759). Also, Collier testified that no one in his presence threatened, intimidated, coerced, or made any promise or inducement to get appellant to sign the waiver form. According to Clark, the appellant at no time expressed any desire to speak with an attorney.

When a person is arrested and asserts his right to counsel, he can change his mind for any reason satisfactory to himself and submit to questioning. United States v. Hodges, 487 F. 2d 945 (Fifth Cir. 1973); Jennings v. United States, 391 F. 2d 512 (Fifth Cir. 1968). The State still has the heavy burden to prove that a person in custody "knowingly and intelligently" waived his privilege against self-incrimination and his right to retained or appointed counsel. Miranda v. State of Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We hold that the State here met this burden in the instant case. The appellant was advised of his constitutional rights on three occasions; he told his brother (Deputy Williamson) that he needed a good lawyer after the first warnings were read to him. It also appears that the interrogating officers, Collier and Clark, were not aware of this request or desire.

There is no contention here that the appellant was denied either food or rest. This is not a case of a long or protracted examination of an accused being held incommunicado and subject to threats or abuse. The record in this cause is entirely to the contrary. The trial court so understood and determined, and such is borne out by the record itself. We are of the opinion

that the trial court's determination as to the voluntariness of the appellant's statement was correct. Luschen v. State, 51 Ala. App. 255, 284 So. 2d 282; Crowe v. State, 54 Ala. App. 121, 305 So. 2d 396; and Bass v. State, 55 Ala. App. 5, 312 So. 2d 576.

Our careful review indicates that the confession here admitted into evidence was not induced by any type of threat or promise, express or implied, nor was there any inducement which would operate to produce hope or favor, or coercion which would render such confession inadmissible. See Gunther v. State, 282 Ala. 620, 213 So. 2d 679; Gamble v. State, 48 Ala. App. 605, 266 So. 2d 817; and Leander Lee Johnson, alias, v. State (Ala. Cr. App.), 6 Div. 523, Ms. March 7, 1978.

The appellant's confession was properly admitted into evidence.

V

The appellant contends that the trial court committed reversible error by misperceiving its function in the post-conviction hearing under Alabama's Death Penalty Statute.

Title 15, Section 342(6), Code of Alabama 1940, Recompiled 1958, provides:

> "Determination of sentence by court; court not bound by punishment fixed by jury - Notwithstanding the fixing of the punishment at death by the jury, the court after weighing the aggravating and mitigating circumstances may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing as the basis for the sentence of death, findings of fact from the trial and the sentence hearing which shall at least include the following:
>
> "(a) One or more of the aggravating circumstances enumerated in section 342(8) of this title, which it finds exists in the case and which it finds sufficient to support the sentence of death, and
>
> "(b) Any of the mitigating circumstances enumerated in section 342(9) of this title, which it finds insufficient to outweigh the aggravating

circumstances. (1975, No. 213, § 4, effective March 7, 1976.)"

At the beginning of the aggravation - mitigation hearing, as required by the Death Penalty Statute, the trial court stated (R. p. 977):

> "THE COURT: All right, we will proceed now with the case of the State against Billy Ray Williamson on the statutory hearing to determine whether or not a sentence fixed by the jury will be altered. Any witnesses that either of you would like to have sworn?"

According to appellant, the trial court's use of the word "alter" and also "change" in a latter part of the proceedings is indicative of the fact that the trial court perceived its function as a reviewer of the jury's determination and not as the sentencing authority.

Judge Harris stated in Jerry Wayne Jacobs v. State (Ala. Cr. App.), 6 Div. 389, Ms. July 26, 1977, as follows:

> ". . . Before a death penalty can be imposed in Alabama, the trial judge is compelled to hold a separate hearing and make written findings of one or more of the aggravating circumstances set forth in the Act. If the trial judge fails to find one or more aggravating circumstances, supported by the evidence, he is empowered to alter the verdict of the jury and sentence the defendant to life imprisonment without parole. Since the verdict of the jury is not binding on the trial court the Act cannot under any construction be classed as mandatory."

In the instant case the trial judge found three aggravating circumstances to exist (See Appendix A). The only mitigating circumstance found to exist by the trial court was that the appellant had no history of prior criminal activity. The trial court determined, after reviewing all the evidence presented at the post-conviction hearing, that the death sentence should be imposed. There is nothing in the record to indicate that the trial court did not conduct the hearing in the manner as required by the statute. The mere usage of the words "alter" and "change" in no way contravenes the meaning or purpose of the post-conviction hearing under the Alabama Death Penalty Statute. Jacobs, supra.

VI

The appellant contends that the trial court committed reversible error by charging the jury on the law of aiding and abetting. Under the Death Statute, the appellant asserts the killing must have been by the defendant and the jury must be so charged in order for the Death Penalty to be applicable.

In John L. Jacobs v. State, supra, Judge Harris stated:

> "Appellant's counsel contend that though he participated in the robbery of the victim he took no part in the actual shooting death of Mr. Knight and, therefore, the death penalty was undeserved. We would remind counsel for appellant that one of the aggravating circumstances in Alabama's new death penalty law is a section which provides:
>
> "'The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit rape, robbery, burglary, or kidnapping for ransom . . . " [Emphasis supplied).'
>
> "The above quoted section squarely fits this case in every respect. Appellant received a fair and impartial trial and that is all that he was entitled to under the law. Death is the penalty of the law, and the penalty is just."

Thus the trial court did not err in its charge to the jury on the applicable law covering aiding and abetting.

In closing, we wish to commend the attorneys representing the appellant and those representing the State of Alabama in this cause. This record indicates a diligent and conscientious defense during trial. This case was hard-fought, but the record shows a fair and impartial trial. We also wish to note the excellent briefs and argument made in this Court by these attorneys.

We have carefully examined this record and find no error therein. This case is due to be and the same is hereby

AFFIRMED.

All the Judges concur.

APPENDIX

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
Plaintiff	)	MORGAN COUNTY, ALABAMA
vs.	)	CASE NO. CC-77-0210
BILLY RAY WILLIAMSON,	)	
Defendant	)	

The defendant has been convicted by a jury after trial of his case on a charge of intentional killing of a human being during the commission of a kidnap for ransom; the punishment was set by the verdict at death. The crime is one of the crimes set forth in Title 15, Section 342 (4) of The Code of Alabama, 1975 interim supplement. Under the mandate of Title 15, Section 342 (5) the court proceeds to a hearing to aid in a finding of facts on which to base a Judgment as to whether or not the penalty of death will be allowed to stand, or the defendant will be sentenced to life imprisonment without parole. The hearing was held on September 14, 1977 at 9:00 A.M. at the Morgan County Courthouse. The defendant with his employed counsel were present in open court; the District Attorney for the 8th Judicial Circuit of Alabama was present representing the State of Alabama. Both the State and the defendant were given an opportunity to introduce evidence. The defendant introducted two witnesses who gave evidence tending to show that the offense in question was committed while the defendant was under the influence of emotional stress by reason of his concern over a serious physical ailment of his wife, and his need for a large sum of money to pay for her medical and hospital bills. It was stipulated and agreed by and between the State of Alabama and the

defendant through his attorney that the defendant has no significant history of prior criminal activity. The State offered no evidence. Both the defendant's attorney and the District Attorney argured the case.

The court finds that the defendant, Billy Ray Williamson, was 42 years old at the time of the offense. He had little formal education, but he was a reasonably intelligent and well oriented individual and was not demented. He was well known to the victim, Jessie T. Davenport, and was a trusted employee of Felton Davenport. Felton Davenport was a son of the victim, Jessie T. Davenport. Felton Davenport owned and operated a trailer home park in Decatur, Alabama, and he was developing a subdivision outside the City of Decatur. He was engaged in the practice of dentistry, and the victim, Jessie T. Davenport, worked in a supervisory capacity in the trailer home park The defendant was employed as a superintendent of the park, and he worked almost daily with the victim, Jessie T. Davenport. Their relationship was on a very friendly basis; it appears that each consid ed the other as a close friend. About one week before the crime the defendant devised a plan to kidnap the victim and secure a ransom of $100,000.00 from Felton Davenport, the victim's son. The motivation for the offense was the desire to obtain the ransom money. He needed a large sum of money to pay the medical and hospital expenses for his wife, but in his statement which was introduced into evidence he did not give this as the reason for the commission of the offense, but stated in general that he wanted the ransom money. There is no explanation throughout all of the record of this case of why he determi to make an apparent good friend the victim of his crime.

The defendant conspired with another person to execute his plan. The two drove to the vicinity of the victim's home early one morning and sat in their car in view of the victim's house until the victim drove away from the house apparently on his way to work. The two stopped the victim, and the defendant got into the victim's truck to ride to the trailer Park where both worked. They went by the dental office of Felton Davenport and talked for a short time with another employee of Felton Davenport, who testified that the defendant and the victim were together at this time. The victim drove to the Trailer Park, and went to the sewage processing plant of the park to perform some work on this small plant. The co-defendant was seen in this area shortly after the defendant and the victim arrived. After a few minutes at this sewage disposal plant the defendant without words with the victim wilfully struck the defendant a violent blow on the side of the head with an instrument which the jury could have found was a three quarter inch iron pipe about eighteen inches long. The victim was immediately knocked unconscious, and the defendant either alone or being assisted by another, threw the victim into the trunk of the automobile of the co-defendant. The defendant drove the truck of the victim to a shopping center near the office of Felton Davenport and abandoned it there. He got into the automobile with the co-defendant, and the automobile was driven by the co-defendant while the defendant and the co-defendant searched for a place to dispose of the body. The body was eventually taken to an isolated wooded area in Cullman County several miles from the trailer Court where the first blow was struck. There was evidence that more than one blow was struck to the head of the victim. The victim died from numerous blows to the head; there were fractures of the skull, lacerations at several

places on the scalp, and masses of blood on the brain resulting from the blows. The body was dropped from a rock formation and was abandon There was evidence that the automobile in which the body was transport to the scene where it was abandoned was partially cleaned by the removal of several articles from it; these articles were found in the vicinity of the body.

After the body was abandoned the defendant directed that a telephone call be made to Felton Davenport, the son of the victim, and that he be advised that the victim had been kidnapped and that he should not notify law enforcement officers, but that he should await for further instructions. Several hours after the first call was made the defendant directed another telephone call be made to Felton Davenport demanding that he leave $100,000.00 at a designated spot, and advised directly or implicitly that this would be necessar in order for the victim to be safely released. At the time of the telephone call the victim was already dead. The defendant attempted to secure two other persons to pick up the ransom money promising to pay them, but not advising them what would be in the package. Each declined. The body was found, and the defendant absconded. After an intensive search for the defendant was under way he surrendered himself at the home of his parents where he had been for only a short time to Sheriff's Deputy of DeKalb County; the Deputy was the defenda brother. On being questioned by law enforcement officials in Morgan County he voluntarily detailed his plans for the kidnap for ransom and the execution of it.

The court further finds that the defendant committed the offense charged for pecuniary gain. The wilful killing of the vict was committed by the defendant while he was engaged in kidnapping the victim for ransom. The offense was especially heinous, atrocious and

cruel. The court further finds that the aggravating circumstances associated with the commission of this offense are sufficient to out weigh the mitigating fact the defendant has no sufficient history of prior criminal activity. The defendant's need for money for hospital and medical expenses for his wife is a need which is common in society; it was not sufficient to disable the defendant mentally or emotionally, and is not sufficient to reduce the punishment for the crime.

Therefore, the court finds that there is no legal basis for the court to change the punishment inflicted by the jury, and the punishment of death is hereby sustained.

This the 15th day of September, 1977.

CIRCUIT JUDGE

FILED IN OFFICE

Clerk

APPENDIX B

THE STATE OF ALABAMA -- -- -- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1978-79

Ex parte: Billy Ray Williamson

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Billy Ray Williamson

77-610 v.

State of Alabama)

RECEIVED
JAN 6 - 1979
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MADDOX, JUSTICE.

AFFIRMED.

Torbert, C. J., Bloodworth, Faulkner, Almon, Embry and Beatty, JJ., concur.

Jones and Shores, JJ., concur in part; dissent in part.

77-610

Ex parte: Billy Ray Williamson

2.

JONES and SHORES, JJ., (Concurring in part; dissenting in part).

We concur in the result to affirm the conviction. We adhere to the statements we expressed in Jacobs v. State, 361 So.2d 640 (Ala. 1978), with respect to the sentence of death.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herein set out as the same appears of record in my office.

Witness my hand this 5 Jan. 79

J. O. Sentell
Clerk, Supreme Court of Alabama

MAILING ADDRESS:
P. O. BOX 157
MONTGOMERY, ALABAMA 36101

TELEPHONE: 832-6480

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

February 9, 1979

Re: ~~SC~~ 77-610
EX PARTE: BILLY RAY WILLIAMSON
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Billy Ray Williamson vs. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above SC number.

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell_____ granted 7 additional days to file briefs to and including

____ Appellant(s) granted 7 additional days to file reply briefs to and including

____ Record on Appeal filed

____ Appendix Filed

____ Submitted on Briefs

____ Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted

____

J. O. Sentell
Clerk, Supreme Court of Alabama

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FEB 10 1979
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CHAPTER 11.

DEATH PENALTY AND LIFE IMPRISONMENT WITHOUT PAROLE.

Cross references. — As to bail for persons charged with capital offenses, see § 15-13-3. As to mental examination of defendants in capital cases, see § 15-16-22. As to suspension of death sentence upon finding of insanity after conviction and sentence, see § 15-16-23. For additional provisions as to death penalty, see § 15-18-80 et seq. As to pardon or parole of person having death sentence commuted to life imprisonment, see § 15-22-27.

See.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.
13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.
13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.
13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.
13-11-5. Conviction and sentence of death subject to automatic review.
13-11-6. Aggravating circumstances.
13-11-7. Mitigating circumstances.
13-11-8. Appointment of experienced counsel for indigent defendants.
13-11-9. Effective date.

§ 13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

§ 13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal

knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as

heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

§ 13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

§ 13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

§ 13-11-5. Conviction and sentence of death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

Cross references.—As to automatic appeal from death sentence generally, see § 12-22-150. As to affirmation of judgment of court in capital cases, see § 12-22-243.

§ 13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

§ 13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

§ 13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

Cross reference. — As to defense of indigents generally, see § 15-12-1 et seq.

§ 13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

SUPREME COURT, U.S.
FILED
JUL 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5026

BILLY RAY WILLIAMSON,

PETITIONER

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

JACK M. CURTIS
ASSISTANT ALABAMA ATTORNEY GENERAL

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OCTOBER TERM, 1979

NO. 79-5026

BILLY RAY WILLIAMSON,

PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, State of Alabama, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Alabama opinion in this case. That opinion is reported at 370 So. 2d 1066 (1979).

QUESTIONS PRESENTED

I.

WHETHER THE ALABAMA DEATH PENALTY STATUTE IS VIOLATIVE OF THE CONSTITUTION FOR FAILING TO ALLOW A JURY TO RETURN A VERDICT ON A LESSER INCLUDED OFFENSE?

II.

WHETHER THE ALABAMA DEATH PENALTY STATUTE IS A MANDATORY STATUTE WHICH ALLOWS DE FACTO JURY SENTENCING DISCRETION?

III.

WHETHER UNDER ALABAMA'S DEATH PENALTY STATUTE AGGRAVATING CIRCUMSTANCES CONSIDERED BY THE TRIAL JUDGE IN DETERMINING WHETHER A DEFENDANT SHOULD BE SENTENCED TO DEATH OR LIFE IMPRISONMENT WITHOUT PAROLE MUST BE PROVEN BEYOND A REASONABLE DOUBT.

IV.

WHETHER THE "STACKING" OF IDENTICAL AGGRAVATING CIRCUMSTANCES AND THE USE OF THAT AGGRAVATING CIRCUMSTANCE WHICH WAS AN ELEMENT OF THE CRIME RENDERS THE SENTENCING PROCEDURE EMPLOYED IN THIS CASE SUFFICIENTLY UNRELIABLE TO INVALIDATE PETITIONER'S DEATH SENTENCE?

V.

WHETHER THE ADMISSION INTO EVIDENCE OF A STATEMENT MADE BY PETITIONER TO POLICE DURING QUESTIONING FOLLOWING A REQUEST BY PETITIONER FOR COUNSEL AND THEN A WAIVER OF COUNSEL PRIOR TO QUESTIONING VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS?

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The Appellant, Billy Ray Williamson, was indicted by the May, 1977 Term of Morgan County Grand Jury for the offense of kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant. This indictment was brought under Title 15, Section 342 (3-11), Alabama Code 1940 (1975 Interim Supp.) The Appellant filed a Motion to Quash and a demurrer to the indictment both of which were overruled by the trial court (R. pp. 1023-1025, 1031). The Appellant was arraigned on June 27, 1977 at which time he entered a plea of not guilty (R. p. 1031).

The case came to trial on August 20, 1977 (R. p. 1032). On August 30, 1977 after voir dire examination of prospective jurors but before beginning to strike the jury, the Appellant moved for a continuance or mistrial on the grounds of prejudicial pre-trial publicity (R. pp. 441-444, 524-532).

The jury returned a verdict of guilty on September 1, 1977 and fixed his punishment at death as required by law (R. p. 1032). On September 14, 1977 a hearing was held by the trial judge to determine the sentence to be imposed (R. pp. 926-1015). On September 15, 1977 the Court sentenced the Appellant to death by electrocution (R. p. 1016). The Court on September 15, presented its written findings of fact upon which the sentence of death was based (R. pp. 1033-1036). On April 4, 1978 the Court of Criminal

Appeals affirmed the action of the trial court. Appellant's Application For Rehearing was overruled on May 2, 1978. Appellant's Petition for Writ of Certiorari was granted by the Alabama Supreme Court on July 25, 1978. On January 5, 1979 the Court affirmed the conviction and sentence of Williamson. Rehearing was denied on February 9, 1979.

STATEMENT OF THE FACTS

The Appellant, Billy Ray Williamson, and his brother-in-law, Bradley Jackson, in April of 1977, devised a scheme to kidnap Jessie I. Davenport for whom the Appellant worked and hold him for ransom (R. p. 901). On Monday, April 25, 1977 the Appellant and Jackson stopped Jessie Davenport's truck as he left his residence and the Appellant got in the truck with Jessie Davenport (R. p. 902). They drove to Mr. Davenport's son's office where they told one of the employees they were going to Kimberly Trailer Court (R. pp. 902, 548-550). The Appellant and Mr. Davenport drove to Kimberly Court in Mr. Davenport's truck and Jackson followed in his Dodge Charger (R. p. 902).

Once at the sewage plant after they started to work, the Appellant struck Davenport on the head with a piece of pipe (R. p. 902). The Appellant and Bradley put Davenport's body in the trunk of Bradley's car (R. p. 903). They parked Mr. Davenport's truck in the parking lot at Big K where it was later found by employees of Mr. Davenport's son (R. pp. 903, 577). The Appellant and Bradley then drove around for a time until they found a remote area near Crane Hill where

they put the body of Mr. Davenport (R. p. 903). They threw a sheet over the body and also took a piece of carpet and a small pillow out of the car and threw them across the road from where they put the body (R. pp. 903-906).

They drove towards Birmingham (R. p. 904). They stopped at a phone booth and Bradley called Jessie Davenport's son to demand a ransom of One Hundred Thousand Dollars ($100,000.00) (R. pp. 904-571). Jessie Davenport's son received a second call around 7:20 p. m. on April 25 at which time he was told to put the money in the brochure box at Rivermont Oaks (R. pp. 905, 573).

Around 8:00 p. m. on April 25, 1977 the Appellant asked Andrea Locsier if she would pick up a package for him (R. pp. 581-583). She refused to do so (R. pp. 584-585). Around 10:00 p. m. on April 25, the Appellant approached Bobby Albrecht and asked him if he wanted to take a ride (R. p. 591). The Appellant and Albrecht drove out to Cotaco where they were building a new project and the Appellant got out of the car (R. p. 593). Albrecht drove around for about twenty minutes, then picked the Appellant up and they drove back to the trailer court (R. p. 593). The next day the Appellant approached Albrecht and asked him if he wanted to make Twenty-Five Thousand Dollars (R. p. 597).

The Appellant was questioned by police on Tuesday night and Wednesday morning (R. p. 909). Jackson's car was searched on Wednesday and blood and hair samples were found in the trunk which were determined by State Toxicologist Brant Wheeler to match Davenport's (R. pp. 616-623, 705-732).

The body of Jessie Davenport was found on Thursday, April 28, in Cullman County (R. p. 643). State Toxicologist James Buttrem testified that death was caused as a result of miltiple blunt force damage delivered to the head (R. pp. 689-690).

A hearing was held outside the presence of the jury at which time testimony was given on the question of whether a statement given to police by the Appellant should be admitted into evidence (R. pp. 752-885). The Appellant was taken into custody at his mother's home by his brother, Jimmy Williamson (R. p. 811). The Appellant was advised of his rights by Jimmy Williamson and taken to DeKalb County Sheriff Bill Ables' house (R. p. 811). The Appellant was then taken to the DeKalb County Jail and from there to Decatur (R. pp. 811-814). When they arrived at the Decatur Police Station they were met by Detective Clark, Detective Collier, and Sergeant Ward (R. p. 756). Jimmy Williamson was allowed to talk to his brother for about ten to fifteen minutes after arriving at the Decatur Police Station (R. pp. 757, 815). Jimmy Williamson testified that after talking to his brother he told Sergeant Ward that the Appellant wanted an attorney (R. p. 817). Jimmy Williamson also testified that earlier his brother had stated that he would need a good lawyer (R. p. 816).

Detective Collier and Clark then talked to the Appellant and after advising him of his rights and after the Appellant signed a waiver of rights form they took a statement from the Appellant (R. pp. 751-763). No threats or promises were made to the Appellant to get him to sign the waiver form (R. pp. 751-763).

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

The Alabama statute does not permit a jury to return a guilty verdict for a lesser included offense and in that way effectively prevents the infrequent and arbitrary imposition of death sentence forbidden by the Constitution. The absence of lesser included offenses will not make it likely that jurors will sentence to death persons who do not deserve so harsh a penalty. Such a result would require the jurors to violate their oaths, to ignore the instructions of the trial judge, and to act in a manner contrary to the historical behavior of juries.

The Alabama death penalty statute does not provide a mandatory death sentence for persons convicted of a capital offense. A guilty verdict is only the first of two steps and it is in the second part, the sentence hearing, that the defendant's punishment is set. The requirement that the jury return a guilty verdict which fixes the punishment at death serves to impress upon jurors the importance of their task thus emphasizing the need for accurate, impartial fact finding. The Alabama statute also avoids the problems of de facto sentencing discretion through jury nullification by precluding consideration of lesser included offenses in capital cases.

The Alabama death penalty statute requires that before an individual can be convicted of a capital offense one

aggravating circumstance must be proven beyond a reasonable doubt. The sentencing hearing held by the trial judge is not a hearing to determine if an aggravating circumstance exists, but a hearing to weigh aggravating and mitigating circumstances in order to determine what sentence is appropriate.

The trial judge in the instant case weighed the nature of the aggravating circumstances against the nature of the mitigating circumstances in determining what sentence to impose. Thus the fact that one underlying aggravating curcumstance was considered twice does not render the sentencing procedure so unreliable as to invalidate petitioner's death sentence.

A suspect may after having requested counsel waive his right to counsel prior to being questioned by police. The admission into evidence of a statement made to police during such questioning does not validate the Fifth or Fourteenth Amendments.

ARGUMENT

A STATUTORY PROVISION THAT PROHIBITS A JURY FROM RETURNING A VERDICT ON A LESSER INCLUDED OFFENSE IS NOT UNCONSTITUTIONAL

Under the Alabama statute's carefully drafted definitions of capital crimes there are no lesser included offenses. Code of Alabama 1975, § 13-11-2(a). While this Court has not held in post-Furman v. Georgia, 408 U. S. 238, cases that the preclusion of lesser included offenses is constitutionally required, it does not follow such preclusion is an unconstitutional method of seeking to obtain the type of sentencing which various members of the Court felt important in Furman.

In Furman, the way in which death penalty statutes had been applied in the past was held to be unconstitutional, because that application: was "pregnant with discrimination", 408 U. S. at 257 (Justice Douglas, concurring); permitted the death penalty to be "wantonly" and "freakishly" imposed, 408 U. S. at 310 (Justice Stewart, concurring); and resulted in the death penalty being imposed with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," 408 U. S. at 313 (Justice White, concurring). The preclusion of lesser included offenses is the most effective means of insuring that de facto jury discretion does not make the operation of a death penalty statute "pregnant with discrimination" because it is imposed with such "great infrequency" as to be "wantonly" and "freakishly" imposed.

Because of this, preclusion of lesser included offenses avoids the pitfalls denounced in Furman, and thereby promotes sentencing that is consistent with the Constitution.

No capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantages of judicial sentencing. As long as the jury has the kind of easy de facto discretion which the availability of lesser included offenses provides, the greater consistency of judicial sentencing and appellate review of sentencing will always be undermined. See, Roberts v. Louisiana, 428 U. S. 325, 335 (1976) (plurality opinion). In the terms of a metaphor used in Woodson v. North Carolina, 428 U. S. 280, 302 (1976), any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely papers over the problem of de facto jury discretion. Of course, Roberts and Woodson involved mandatory statutes. While the papering-over job might render the defect somewhat less apparent in non-mandatory schemes, defects still remain beneath the surface whenever a jury has lesser included offenses available as an alternative to capital sentencing.

In his brief Petitioner speculates that the preclusion of lesser included offenses might cause juries to convict a defendant of a capital offense, when that defentant was merely guilty of a lesser offense which should have been but was not included. Such speculation is unpersuasive for three reasons. First of all, there is absolutely no indication or evidence that such cold-hearted irresponsibility has ever occurred or will ever occur. In this case, the trial court judge instructed the jury that they would have to be convinced beyond a reasonable doubt of the existence of all elements of the capital offense with which the petitioner was charged

before they could convict the defendant (R. pp. 948 - 970). The jurors were properly instructed on this point, and "it should not be assumed that juries will disobey or nullify their instructions." Jurek v. Texas, 428 U. S. 262, 279 (1976)) (Concurring opinion of Justice White, joined by Chief Justice Burger and Justice Rehinquist).

The second reason why Petitioner's argument is unpersuasive is that historical experience directly contradicts it. The available evidence indicates that because of compassion, juries tend, if anything, to resolve such questions in favor of the accused. The jury nullification data relied upon to strike down mandatory death penalty sentences in Woodson v. North Carolina, 428 U. S. 280, 289-293 (plurality opinion), demonstrates the extent to which juries will go to spare defendants from capital punishment. In the face of such evidence, Petitioner's argument that jurors would callously elect to send to his death a man whom they concluded was not guilty of a capital offense is without any support.

The third reason why Petitioner's argument is unpersuasive is that it incompletely states the facts. If the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, § 13-11-2(c).

In summary, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required.

Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. All of the historical evidence concerning the behavior of juries in capital cases is to the contrary. In any event, the Alabama statutory system contains an important safety-valve in tht a mistrial can be declared if a jury is unable to agree on a verdict or on the sentence of death. After such a mistrial, the defendant can be re-tried for the capital offense or he can be reindicted for a non-capital offense.

II.

THE STATUTE IS NOT A MANDATORY DEATH PENALTY ACT, AND WHILE IT OPERATES TO INSURE THAT JURY VERDICTS WILL BE RELIABLE, IT DOES NOT PERMIT DE FACTO SENTENCING DISCRETION

The only mandatory aspect of Alabama's statute is that it mandatorily requires that the trial court hold a post-conviction sentence hearing to carefully weigh aggravating and mitigating circumstances before deciding on the sentence. Jacobs v. State of Alabama, 361 So. 2d 640, 644 (Ala. 1978). The jury's function is to find guilt or innocence. Jacobs v. State of Alabama, 361 So. 2d 697, 631 (Ala. Cr. App. 1977). A jury verdict of guilty is a necessary step in the sentencing process, but the judge is the sentencing authority, not the jury. Jacobs v. State of Alabama, 361 So. 2d 640, 644 (Ala. 1978).

Even though the jury is required to phrase any guilty verdict in terms referring to the punishment of death, this

is only an adjudication of guilt. No sentence exists until the judge pronounces one after he has held the post-conviction sentence hearing. Beck v. State of Alabama, 365 So. 2d 985 (Ala. Cr. App. 1978).

Even though the jury is not the sentencing authority, the requirement that any guilty verdict it return "fix the punishment at death" serves a very important function. As the plurality pointed out in Gardner v. Florida, 430 U. S. 349, 357-358 (1977) (Opinion by Justice Stevens, joined by Justice Stewart and Justice Powell), five Members of the Court have recognized that for constitutional purposes death is a punishment different from any other. Because of the profound difference between death and other punishments, greater reliability is necessary. See, Lockett v. Ohio, 98 S. Ct. 2954, 2964 (1978) (plurality opinion). The fact-finding process should not be taken lightly. In a capital case, a procedural device is valuable if it helps insure that jurors vote to convict only those defendants whose guilt the jurors are truly convinced of beyond a reasonable doubt and to a moral certainty. The best way to insure that jurors are aware of their awesome task and its terrible responsibilities is to confront them with it. That is what the statutory provision accomplishes when it requires the jury to phrase a guilty verdict in terms of the punishment of death, even though the jury is not the sentencing authority. Any capital sentencing system in which the jury is tempted to "pass the buck" to the judges runs the risk that guilt adjudication will not be as reliable as possible. Under Alabama's system, the jury believing that the "buck stops here" has more reason to realize its awesome responsibility and to discharge it with care.

The Court's decisions in Woodson v. North Carolina, 428 U. S. 280 (1976), and Roberts v. Louisiana, 428 U. S. 325 (1976), are not authority for invalidating Alabama's new Death Penalty Act. On page 16 of his brief, Petitioner appears to concede that only one of the grounds relied upon by the pluralities in Woodson, supra, and Roberts, supra, is even arguably applicable to Alabama's statute. That ground is that juries night exercise a "de facto sentencing discretion" which would lead to unconstitutional arbitrariness and capriciousness in the infliction of the death penalty. Woodson v. North Carolina, 428 U. S. at 302-303. However, the Alabama statute is constitutionally different from the North Carolina and Louisiana statutes which were struck down in Woodson and Roberts. Those statutes were seen as permitting or even encouraging jurors to use de facto sentencing discretion through the device of convicting for lesser included offenses. Indeed, the Louisiana statute requires that juries be instructed on lesser included offenses even when the evidence would not support such an instruction. Roberts v. Louisiana, 428 U. S. 325, 334-335 (1976). Such death penalty stututes "simply papered over the problems of unguided and unchecked jury discretion." Woodson v. North Carolina, 428 U. S. 280, 302 (1976) (plurality opinion).

Petitioner's argument is that the Woodson and Roberts cases are authority for the proposition that under Alabama's statute juries will ignore their instructions and fail to convict guilty defendants of a capital offense, and that this nullification will occur with such regularity that the operation of the statute will be arbitrary and capricious. This argument is wrong, because Alabama's statute is different

from the North Carolina and Louisiana statute. The most important difference is that Alabama's statute contains no lesser included offenses. Code of Alabama 1975, § 13-11-2(a). Jury nullification through lesser included offenses is not possible under the Alabama statute. Instead, the only possibility for jury nullification is through acquittal.[1] The offenses which are punishable by death under the Alabama statute are very narrowly drawn to include only the most serious and dangerous crimes. There is simply no real prospect that a jury convinced beyond a reasonable doubt that a person had committed such a serious and dangerous crime would ignore their instructions and let that person go free. There is no historical evidence to indicate that a jury would act in such a fashion.

The historical evidence relied upon in Woodson and Roberts to predict that those two statutes would operate capriciously does not support such a prediction concerning the operation of Alabama's statute. First of all, the offenses made punishable by death under Alabama's statute are very narrowly drawn to include only the most dangerous and serious crimes. Secondly, Alabama's statute does not permit the exercise of de facto jury sentencing discretion through the device of convictions for lesser included offenses. The historical evidence about jury nullification was influenced by the fact that it included the results of mandatory death penalty acts which were broadly drafted to include a broad

[1]If the jury is unable to agree, a mistrial can be declared, but a judgment of mistrial in no way prevents the defendant from being retried for the capital offense. Code of Alabama 1975, § 13-11-2(c).

range of crimes. Such historical evidence is also inapplicable to the present case because it was based upon cases brought under statutes which permitted de facto jury discretion rhrough convictions for lesser included offenses.

In summary, Alabama does not have a mandatory death penalty act. Instead, the act has been carefully drafted to insure the reliability of any guilty verdicts obtained under the act. There is no opportunity for the kind of de facto sentencing discretion which has been held constitutionally impermissible. The way the statute is drafted and the operation will not be inflicted in an arbitrary and capricious manner under the statute.

III.

UNDER ALABAMA'S DEATH PENALTY STATUTE THE SENTENCING HEARING IS A WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES NOT A HEARING TO DETERMINE IF AN AGGRAVATING CIRCUMSTANCE EXIST, AND AS SUCH, AGGRAVATING CIRCUMSTANCES NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT.

Alabama's Death Penalty Statute requires the trial judge to hold a sentence hearing and carefully weigh the aggravating and mitigating circumstances in each case before deciding whether to sentence the defendant to death or to life imprisonment without parole.[2] The Petitioner contends

[2]Code of Alabama 1975, § 13-11-3

that Alabama's statute should be declared unconstitutional because the State is not required to prove beyond a reasonable doubt the existence of aggravating circumstances necessary to justify imposition of the death penalty at the post sentence hearing.

Alabama's Death Penalty Statute provides that only certain aggravated offenses shall be punishable by death.[3] Thus an individual in Alabama cannot be found guilty of a capital offense and sentenced to death unless at least one aggravating circumstance is found. Since this aggravating circumstance is an element of the crime it must be proven beyond a reasonable doubt.

Alabama's Death Penalty Statute differs from those of Florida[4] and Nebraska[5] in that under the statutes of those two States the aggravating circumstances of the crime are not considered until the sentencing phase of the procedure. Under Alabama's Statute at least one aggravating circumstance must be proven during the determination of guilt phase of the proceedings.

The sentencing hearing under the Alabama Statute involves a weighing of any aggravating and mitigating circumstances surrounding the crime to determine what the appropriate sentence should be. Cook v. State, 369 So. 2d 1251, 1257 (Ala. 1979). The State at the trial has already established an aggravating circumstance which results in the defendant being sentenced to death by the jury. Thus proof

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[3] Code of Alabama 1975, § 13-11-2

[4] Fla. Stat. Ann., § 782.04(1) and § 921.141

[5] Neb. Stat. Ann., § 28-401 and § 29-2520 through 2524.

of an aggravating circumstance at the sentencing hearing is not necessary in order to impose a sentence of death. This is not the case under the Florida and Nebraska Statutes.[6] Thus the requirement under the Nebraska and Florida Statutes that the aggravating circumstances be proven beyond a reasonable doubt during the sentencing hearing would not apply to Alabama's sentencing procedure.

IV.

THE TRIAL JUDGE'S COMPARISON OF THE NATURE OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES WHICH WERE SHOWN TO EXIST IN THE INSTANT CASE SATISFIED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial judge in the instant case made a comprehensive finding of facts upon which he based his finding of the existence of three aggravating circumstances. These three circumstances were that the defendant committed the crime for precuniary gain, that the willful killing of the victim was committed by the defendant while he was engaged in kidnapping the victim for ransom, and that the offense was especially heinous, atrocious and cruel (R. p. 1036).

It is clear from the Alabama Supreme Court's decision in Cook v. State, 369 So. 2d 1251, 1256 (Ala. 1979), that the aggravating circumstance of the crime having been committed

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[6] See Footnotes 4 and 5.

for pecuniary gain was not appropriate in this case. Since the Williamson Case, supra, was decided after Cook, however, it is apparent that the Alabama Supreme Court felt that the sentencing process in Williamson satisfied the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

It seems clear from the Alabama Supreme Court's decision in Cook that the aggravating circumstance described in the crime is one of the aggravating circumstances to be considered at the sentencing hearing. In Cook, supra, the Court stated at 1256:

> "We are left with the problem of catergorizing the evidence received and balancing the aggravating circumstances with the mitigating circumstances. At Cook's sentencing hearing the trial judge found that two aggravating circumstances were present: (4)— a capital felony committed in the course of a robbery, and (6)—— a capital felony committed for pecuniary gain. In so finding we feel that the learned trial judge misconstrued the latter aggravating circumstance, in effect condemning Cook twice for the same culpable act —— stealing money. Subsection 6 would, of course, cover a variety of crimes committed with the hope of financial benefit, ranging from 'murder-for-hire' to an heir killing his benefactor to gain his inheritance. But we do not think it appropriate to apply this aggravating circumstance to situations already condemned under subsection 4 which by definition involve an attempt at pecuniary gain. Thus, to avoid repetition, subsection 6 should not be applied to a robbery. The trial court erred in considering it and including it in the findings of fact."

At the sentencing hearing the trial judge must weigh the nature of the aggravating circumstance that was proven at trial and any other aggravating circumstances that may have been proven at the trial or which are proven at the sentencing hearing against any mitigating circumstances which may be shown. In Cook v. State, 369 So. 2d 1251, 1257 (Ala. 1979) the Alabama Supreme Court stated:

> "Once all of the proper evidence has been received at the sentencing hearing and arguments have been given, the trial judge must 'weighing the aggravating and mitigating circumstances' and sentence the defendant to death or life imprisonment without parole. § 13-11-4, Code of Ala. 1975. This 'balancing' should not, however, be construed to authorize a 'tallying' of items for and against the defendant. We can readily envision situations where several aggravating circumstances may not be sufficient to outweigh only one mitigating circumstance and, on the other hand, where numerous mitigating circumstances may be present but opposed to one aggravating circumstance so outrageous as to justify the death penalty."

It is clear in the instant case that the trial judge weighed the various aggravating and mitigating circumstances and determined that death was the appropriate sentence (R. p. 1036). The fact that the trial judge did not merely count the number of aggravating and mitigating circumstances and decide what the sentence was to be on the basis of which was more numerous but examined the nature of each circumstance establishes that the sentencing hearing was a meaningful process. Also since the trial judge considered the nature of the aggravating and mitigating circumstances the fact that one underlying aggravating circumstance was considered twice does not make the sentencing process invalid.

V.

THE PETITIONER AFTER HAVING REQUESTED COUNSEL PRIOR TO QUESTIONING BY POLICE WAIVED HIS RIGHT TO COUNSEL BY SIGNING A WAIVER OF RIGHTS FORM AND SUBMITTING TO QUESTIONING BY POLICE.

The United States Supreme Court in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 and Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, recognized that an individual held for interrogation must clearly be informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation and that interrogation must cease if the individual states that he wants an attorney. In the present case the defendant was taken into custody by his brother, Jimmy Williamson (R. p. 811). According to the testimony of Jimmy Williamson, he advised the defendant of his rights at the time he took him into custody and that the defendant told him at that time that he wanted an attorney (R. pp. 811-817).

The defendant was taken to the Decatur City Hall by Deputy Jimmy Williamson, and DeKalb County Sheriff Ables. They were met by Detective Robert Clark, Detective Kenneth Collier and Sergeant Doyle Ward (R. p. 756). At that time the defendant's brother, Deputy Jimmy Williamson, was allowed to talk with the defendant for ten to fifteen minutes in the narcotics office (R. p. 757). Deputy Jimmy Williamson testified that when he came out of that office he told Sergeant Ward that the defendant wanted an attorney (R. p.

817). There had been no attempts to question the defendant by any police officer at this time.

Detective Kenneth Collier testified that he and Detective Robert Clerk entered the office where the defendant was located after the defendant's brother came out (R. p. 753). There is no indication that Deputy Williamson told either Detective Clark or Collier that the defendant wished to speak with an attorney (R. p. 753). The defendant was read his constitutional rights by Detective Clark and then the printed form was given to the defendant to read (R. p. 758). After Detective Clark asked the defendant if he understood what he had read and understood what he had been told concerning his rights and the defendant stated he did, the defendant signed the waiver of rights form (R. p. 759). Detective Collier also testified that the defendant was in no way threatened, coerced or made any promise to get him to sign the waiver form (State's Exhibit No. 44).

It appears from the evidence that Detectives Collier and Clark were unaware that the defendant's brother had told Sergeant Ward that the defendant wanted an attorney when they went in to question the defendant. The defendant was informed by Detective Clark of his right to consult with an attorney but according to the testimony of Detective Collier the defendant at no time expressed any desire to speak with an attorney. Also, the defendant signed a waiver of rights form, after his rights were explained to him by Detective Clark.

While the United States Supreme Court in Miranda v. Arizona, supra, recognized that an individual held for interrogation must be advised of his right to consult with counsel before questioning, the court also recognized that

this right may be waived. Also when a person is arrested and asserts his right to counsel, he can change his mind and submit to questioning. United States v. Hodges, 487 F. 2d 945 (Fifth Cir. 1973); Jennings v. United States, 391 F. 2d 517 (Fifth Cir. 1968).

The fact situation in the instant case is similar to that in the Jennings case, supra, in that the two detectives who questioned the defendant were unaware that he had requested an attorney. Detectives Clark and Collier informed the defendant of his rights before they began questioning him and the defendant voluntarily signed a waiver of rights form. It seems clear that the Appellant's confession in the instant case was not induced by any type of promise, express or implied, nor was there any type of inducement given the defendant. The defendant't statement appears to have been voluntarily given and was thus properly admitted into evidence.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Respondent's Brief on the Attorneys for Petitioner, Honorable Julian W. Royer, Jr., and Honorable George W. Royer, Jr., by depositing the same in the United States Postal Service, duly stamped and addressed as follows:

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